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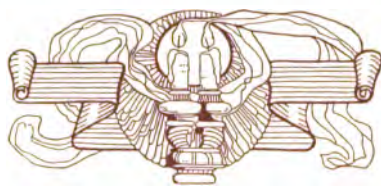
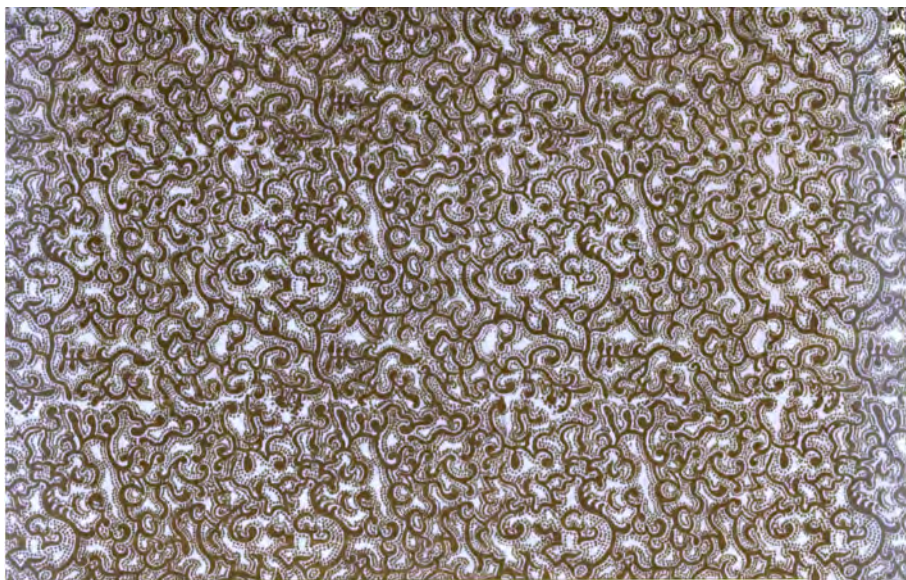
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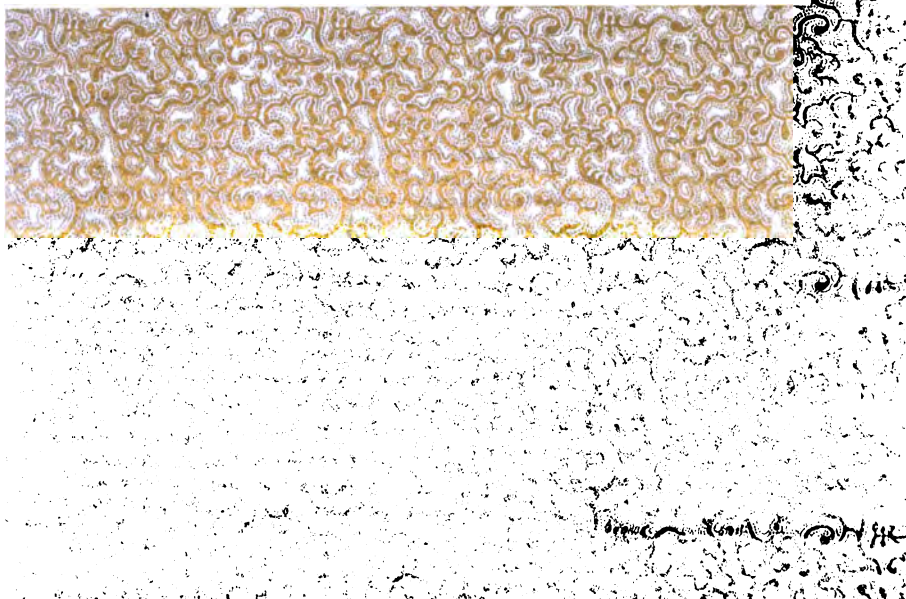
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CHAMIZAL ARBITRATION

ARGUMENT OF THE UNITED STATES OF AMERICA

BEFORE THE

INTERNATIONAL BOUNDARY COMMISSION
UNITED STATES—MEXICO

HON. EUGENE LAFLEUR, PRESIDING

UNDER THE

PROVISIONS OF THE CONVENTION BETWEEN THE UNITED
STATES OF AMERICA AND THE UNITED STATES
OF MEXICO, CONCLUDED JUNE 24, 1910



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CHAMIZAL ARBITRATION.

PRINTED ARGUMENT OF THE UNITED STATES OF AMERICA BEFORE THE INTERNATIONAL BOUNDARY COMMISSION, THE HONORABLE EUGENE LAFLEUR PRESIDING.

INTRODUCTORY STATEMENT.—THE CONVENTION OF JUNE 24, 1910.

Article 5 of the Convention of June 24, 1910, provides

“At the first meeting of the three Commissioners each party shall deliver to each of the Commissioners and to the Agent of the other party, in duplicate, with such additional copies as may be required, a printed argument showing the points relied upon in the case and counter-case, and referring to the documentary evidence upon which it is based.”^a

In accordance with this provision the United States submits the following statement of points relied upon, supported with references to the documentary evidence in the record before the commission.

The question to be decided by the International Boundary Commission in this case is precisely defined in Article 3 of the Convention which says “the Commission shall decide solely and exclusively as to whether the international title to the Chamizal Tract is in the United States of America or Mexico.”^b

The tract in dispute is defined by metes and bounds in Article 1 of the Convention.^c As has been pointed out in the Case of the United States,^d this is not a case of first impression, but has already been once submitted to the International Boundary Commission. The Treaty of June 24, 1910 categorically states that the “differences which have arisen between the two governments as to the international title to the Chamizal Tract upon which the members of the International Boundary Commission have failed to agree” (Preamble) are now “again referred to the International Boundary Commission * * * enlarged by the addition for the purposes of the consideration and decision of the aforesaid differences only by a third commissioner, who shall preside over

^a U. S. Case Appendix p. 5.

^b U. S. Case Appendix p. 4.

^c U. S. Case Appendix p. 3.

^d Case of the U. S. p. 13-19.

the deliberations of the Commission" (Article II). It is therefore the same case sent back for retrial in the same court.

Mexico was claimant at the first trial of the Chamizal Case before the International Boundary Commission in 1894-96 ^a and is therefore again claimant now that the case has been "again referred" for trial. This result also follows from the fact that Mexico is seeking through the decision of the International Boundary Commission to oust the United States from territory which has been in its possession ever since the gradual formation of the land.^b The fact that in accordance with terms of the convention both parties file their cases and counter-cases and printed arguments on the same day is in no wise inconsistent with this contention, this being a common practice in international arbitration of this character, even in cases in which one of the litigant governments is clearly the claimant.^c

Mexico as claimant, is accordingly charged with the burden of establishing her case upon all propositions of law and fact by the preponderance of evidence.

An additional duty of going forward with the evidence rests upon Mexico because Mexico is attempting to maintain that the international boundary line along the Rio Grande is a fixed mathematical line coinciding with the Rio Grande only at points of intersection, whereas the United States contends for a fluvial boundary along the Rio Grande and "Vattel says, Book I, ch. 22, sec. 268: 'In case of doubt, every territory terminating on a river is presumed to have no other boundary than the river itself; because nothing is more natural than to take a river for a boundary, when a settlement is made; and wherever there

^a Joint Journal July 10, 1896, U. S. Case Appendix, p. 185.

Article 5 Rules and Regulations of the International Boundary Commission, U. S. Case Appendix, p. 93.

See Case of the United States, p. 13.

See U. S. Case Appendix, p. 212.

^b Case of the U. S., p. 44. The opening sentence of the Mexican Case appears to recognize that Mexico comes before this Tribunal as a claimant in the following apt language: "The United States of Mexico demand from the Government of the United States of America the acknowledgment on the part of the latter as the property of the former, and therefore subject to the jurisdiction of Mexico, the lands known as 'El Chamizal,' etc. (Mexican Case, p. 1.) At the conclusion of the Mexican Counter-case, however, the learned Mexican Agent reaches the conclusion that "in none of the articles of the Convention does it appear that Mexico has assumed the character as claimant." (Mexican Counter-case, p. 52.)

^c See, for example, Protocol of February 9, 1909, United States and Venezuela, submitting three cases in which the United States was claimant, to the Hague Tribunal, Treaties and Conventions, Vol. 2, p. 1889. Protocol of December 1, 1909, United States and Chile, submitting the Alsop Claim, in which the United States is claimant, for arbitration, etc., etc. Compare Mexican Counter-case, p. 52.

is a doubt, that is always to be presumed which is most natural and most probable.'"^a

The Treaty of June 24, 1910 modifies and supplements the Convention of 1889 establishing the International Boundary Commission in the following particulars:

First. By the "addition for the purposes of the consideration and decision of the aforesaid differences only, of a third Commissioner" (Article 2).^b

Second. By making the decision "final and conclusive upon both Governments, and without appeal", (Article 3),^c instead of subject to the disapproval of the two governments within the period of one month as provided by Article 8 of the Convention of 1889.^d

Third. In view of the contentions set forth in the Mexican note of January 15, 1910, it is recited in the preamble of the convention of June 24, 1910, that the two governments desire that the decision of the International Boundary Commission be rendered "in accordance with the various treaties and conventions now existing between the two countries, and in accordance with the principles of international law".^e

The preamble of the convention was proposed by the United States^f and accepted substantially as proposed.

The Mexican counter-case lays great stress upon the fact that while the draft as proposed by the United States reads "the United States of America and the United States of Mexico, desiring to terminate in accordance with the various conventions now existing between the two countries and in accordance with the principles of international law etc.", the Mexican counter-draft, accepted by the United States reads "in accordance with the various treaties and conventions now existing between the two countries and in accordance with the principles of international law" ^g i. e. the word "treaties" has been inserted.

It is submitted that there is absolutely no difference in the meaning of the preamble as proposed by the United States and as proposed by Mexico and adopted by the two countries. The words treaty and convention are for all practical purposes

^a U. S. Case Appendix, p. 212.

^b U. S. Case Appendix p. 4. See also Preamble, p. 3.

^c U. S. Case Appendix p. 4.

^d U. S. Case Appendix p. 75.

^e U. S. Case Appendix p. 3.

^f U. S. Counter-case p. 21, citing Mr. Knox to Señor de la Barra, June 17, 1910, U. S. Case Appendix p. 434 and 435.

^g U. S. Counter-case Appendix pp. 35 and 38.

synonyms in international law. As Calvo says "in practice the word treaty or convention is used indifferently".^a They require the same formalities in their negotiation and ratification by the constitutional law of both the United States and Mexico.^b

And finally the terms are used interchangeably in the treaties and conventions between the United States and Mexico.^c

It is submitted therefore that there is no difference in the meaning between the preamble as proposed by the United States and as modified by the insertion of the word "treaties" and adopted by the two countries. However, in the view of the United States this point is of no importance and has been noticed only in deference to the stress placed upon it by the learned Mexican Agent.

As queried in the countercase of the United States "if the United States had by any inadvertance" proposed a stipulation which would have precluded the tribunal from considering the fixed boundary theory now propounded by Mexico "is it reasonable to suppose that the Mexican Foreign Office would have accepted it?"^d This query, as was to have been expected,

^a Calvo, International Law, 2d Edition, Vol. 1, p. 689.

Vattel, Law of Nations, p. 287, 314, — Edition.

Piédelièvre, Short treatise on International Public Law or the law of Nations (1894) I: 279.

Pradier-Fodéré: II: 472.

Hall International Law, 6th Edition p. 321.

Butler's Treaty Making Power of the United States, paragraph 463, Note.

Moore, International Law Digest, Vol. 5. p. 155.

Larousse, Dictionary, 5: 33, 15: 402.

Répertoire général alphabétique du droit français, 35: 977 (Paris, 1905).

^b Constitution of the United States, Art. 2, Sec. 2, Paragraph 2, Rodriguez, American Constitutions, Vol. 1, p. 24. Butler's Treaty Making Power of the United States.

Constitution of the United Mexican States, Art. 72, Sec. 13, Rodriguez, American Constitutions, Vol. 1, p. 56; Article 85, Sec. 10, Ibid, p. 61; Law of November 13, 1874, amending the Mexican Constitution Paragraph 3, Art. 72, Sec. 6B1, Ibid p. 79.

^c The original treaties and conventions between the United States and Mexico, 1848 to 1910, have no headings, except the Convention of 1848 and the Convention for the Arbitration of the Chamizal Case, 1910. (The Treaty of 1848 has a quasi heading.) The remaining headings assigned to these treaties are purely arbitrary and are therefore bracketed in the Appendix to the Case of the United States. (See U. S. Case Appendix pp. 3 to 92.) In the text of the various treaties and conventions the words "treaty" and "convention" are used interchangeably, both words frequently being applied to the same instrument in the same instrument. For example the preamble of the convention (or treaty) of 1889 establishing the International Boundary Commission says that "the two republics have resorted to conclude a *treaty*," while Article 9 says "this *convention* shall be ratified". The preamble of the same convention refers to the "*treaty* of November 12, 1884" whereas Article 4 refers to "Articles 1 and 2 of the *convention* of November 12, 1884", and Article 5 refers to "Article 3 of the *convention* of November 12, 1884. Again take the Convention (or treaty) of March 20, 1905, (U. S. Case Appendix pp. 85 to 89). In Articles 1, 3, 4 and 5 the word "convention" is used to describe that instrument while in Article 2 it is referred to as "this *treaty*" and in the protocol of signature, signed November 14, 1905, it is referred to as "the *treaty* for the elimination of bancos in the Rio Grande". The same instrument in its preamble twice refers to the "*convention* of 1884", but in article 1 speaks of "the *treaty* of November 12, 1884." (Italics in this note are ours.)

^d U. S. Countercase, p. 21.

is answered with a decided negative by the Mexican Countercase.^a But the fact that the two governments agreed to make it clear that in referring the Chamizal case again to the International Boundary Commission they did not intend to confine the commission to the consideration of the case under the treaty of 1884 exclusively but intended to permit the commission to pass upon the contention of the Mexican Government as to the fixed line theory, does not go any distance at all towards showing that the governments intended to say that the treaty of 1884 should not be applied to the case if in the opinion of the International Boundary Commission it is applicable. The admitted intent to leave it open to the International Boundary Commission to say whether or not the treaty of 1884 applies is no argument at all to show an intent that the Commission should not apply the treaty of 1884 or to use the language of the countercase of the United States, "the fact that the United States has agreed to arbitrate this case is not an argument for a decision against the United States."^b The United States must therefore respectfully join issue with the statement of the Mexican countercase that the treaty of June 24, 1910 has "acknowledged and protected the unquestionable right of the Mexican Government that the case be to-day discussed laying altogether aside the Convention of November 12, 1884."^c

The law of this case as prescribed by the terms of the submission is "the various treaties and conventions existing between the two countries" and "the principles of international law."

^a Mexican Countercase, pp. 15-17.

^b U. S. Countercase p. 22.

^c Mexican Countercase, p. 16. See another passage in the Mexican countercase where it is stated "that the desire of both governments was to terminate the El Chamizal case in accordance not only with the provisions established under Articles Number 1 and 2 of the Convention of 1884, but also in conformity with the treaties and conventions now existing." Mexican countercase, p. 17.

**THE TREATY OF GUADALUPE HIDALGO OF 1848 AND THE GADSDEN
TREATY OF 1853.**

INTRODUCTORY STATEMENT.

The case of the United States submits the following proposition as to the law:

"That the Treaty of Guadalupe Hidalgo of 1848 and the Gadsden Treaty of 1853 fix the middle of the Rio Grande, from its mouth to parallel $31^{\circ} 47'$ north latitude, as the boundary between the United States and Mexico; that the true intent and meaning of these treaties is correctly expounded in the opinion of Attorney General Cushing, rendered November 11, 1856, which is adopted and incorporated in toto, by reference; that in substance this opinion holds that if the channel of the river changes by gradual accretion, the boundary follows the channel, if the channel changes by avulsion the boundary remains in the abandoned bed of the river." ^a

In support of this proposition the United States relies upon the following considerations:

In the early days of the settlement of the new world the Rio Grande was a fluvial boundary between the territorial possessions of France and Spain. ^b

Subsequently it was claimed by the United States as successor in title to France, as the western boundary of the Louisiana Purchase ^c until by the treaty of 1819 the United States and Spain adjusted all their outstanding boundary questions, Spain ceding the Floridas to the United States and the United States accepting the Sabine, the Red River, and the Arkansas as its boundary to the West and South. ^d

Still later the Rio Grande became the fluvial boundary between Mexico and the Republic of Texas. ^e

^a U. S. Case, pp. 43 and 44.

^b See Napoleon's secret instructions of Nov. 26, 1802, for the Captain General of Louisiana, Countercase of U. S.; p. 123.

Mr. Adams to Señor don Luis de Onís Mar. 12, 1818, Countercase of the U. S., appendix, p. 124.

^c See Mr. Adams to Señor don Luis de Onís, *supra*.

^d Treaties and Conventions, 1776-1909, pp. 1651 and 1652.

^e Treaty of Velasco. Congressional Globe Appendix, volume 19, Thirtieth Congress, first session, p. 660.

An act to define the boundaries of the Republic of Texas, approved Dec. 19, 1836 U. S. Countercase, p. 134.

Joint resolution annexing Texas to the United States, approved Mar. 1, 1845, U. S. Countercase, p. 132.

An act extending the laws of the United States over the State of Texas, and for other purposes, approved Dec. 29, 1845, U. S. Countercase, p. 133.

Joint resolution of the Congress of the Republic of Texas assenting to the annexation of Texas to the United States, U. S. Countercase, p. 135.

It is therefore in the light of about 150 years of history during which the Rio Grande had formed a fluvial international boundary line that we approach the Treaty of Guadalupe Hidalgo of 1848 and the Gadsden Treaty of 1853.

The treaties should also be approached in the light of the general practice of nations as embodied in the principles of international law and conventional arrangements. "In doubtful cases," says Grotius, "the territories bordering upon a river ought to be considered as arcifinious, because nothing can be a more apt mark of distinction than those impassable bounds assigned by nature."^a

With the progress of civilization, rivers have ceased to be impassable bounds and their waters have on the contrary come to be the highways of commerce between neighboring peoples or peoples of the same State. They still serve, however, in many cases to mark the limits between adjacent countries and as such are still deemed natural boundaries. This common practice of the nations utilizing rivers as boundaries has led to a host of boundary treaties in which this practice is embodied. As sovereign nations are empowered to draw their boundary lines as they please, it is natural that these treaties^b should show certain differences.

I. A number of these conventional arrangements simply make "the river" the international boundary line without specifying that the line shall run in any particular channel.

September 18, 1773. Russia-Poland. Treaty. *Dwina, Dnieper*. R. 1st ed. 4: 137:

"So that the Dwina River will be the *natural* boundary between the two states. * * * and from the mouth of the Druiec river the Dnieper shall be the boundary between the two states."^c

March 29, 1815. Sardinia-Geneva. Minutes of the conference * * * concerning cessions made by the King of Sardinia to the Canton of Geneva. *Hermance*, B. and F. St. P., 2: 149: "From Venezas to the point where the Hermance River crosses

^a Grotius, Rights of War and Peace, Campbell's translation, p. 107.

See also Vattel, sec. 268; Twiss's Law of Nations, sec. 140.

^b In quoting these treaties the following scheme has been followed: *Abbreviations*: R. means "Recueil de traités," by Martens. N. R. means the continuation of the above as the "Nouveau recueil." N. R. G. means the continuation of the preceding as "Nouveau recueil général." B. and F. St. P. means "British and Foreign State Papers." In quoting from treaties, the date will be given first, followed by the names of the countries, the title of the treaty, and the names of the rivers concerned.

^c "De sorte que la rivière de la Dwina sera la limite naturelle entre les deux États. * * * & depuis l'embouchure de la rivière Druiec, la Dnieper sera la limite entre les deux États."

the said route; and thence continuing along the course of this river to its opening into Lake Geneva."^a

May 18, 1815. Prussia-Saxony. Territorial treaty. *Wittich*. B. and F. St. P. 2:85:

"This line will leave the boundaries of Bohemia near Wiese in the neighborhood of Seidenberg, following the current of the Wittich creek to its junction with the Neisse."^b

May 31, 1815. Netherlands-Austria. Treaty relating to the Netherlands. *Worm*. B. and F. St. P. 2:138:

"The said line follows that which separates the two last-named departments up to the point where it touches the Worm * * * and follows along this river."^c

July 5, 1825. France-Bavaria. Boundary convention. *Schwalb*. N. R. 8:2.

"The boundary, from its starting point situated on the Blise * * * shall remain as at present fixed, except only the part where this boundary was formed by the Schwalb river; in this part it shall henceforth be determined by the new course given to this river for the purpose of straightening it."^d

II. An overwhelming majority of the treaties providing for boundaries along rivers specify the "middle of the river" or "thalweg," or "center" or "thread" of the channel as the international boundary line.

Feb. 10, 1763. Great Britain-Spain. Final treaty of peace and friendship. *Mississippi, Iberville*. R. 1st ed. I: 38:

"It is agreed that in future the boundaries between the states of his Britannic Majesty and those of his very Christian Majesty in this part of the world shall be irrevocably fixed by a line drawn in the middle of the Mississippi River from its source to the Iberville river, and thence by line drawn in the middle of this river and from the Maurepas and Pontchartrain lakes to the sea."^e

^a "Depuis Venezas jusqu'au point où la rivière d'Hermance traverse la susdite route; et de là continuant le cours de cette rivière jusqu'à son embouchure dans le lac de Genève."

^b "Cette Ligne partira des confins de la Bohême près de Wiese dans les environs de Seidenberg, en suivant le courant du ruisseau Wittich jusqu'à son confluent avec la Neisse."

^c "Ladite Ligne suit celle qui sépare ces 2 derniers Départements jusque là où elle touche à la Worm * * * et longe cette rivière."

^d "La limite, depuis son point de départ situé sur la Blise * * * restera telle qu'elle est maintenant fixée, à l'exception seulement de la partie où cette limite étoit formée par la rivière de la Schwalb; dans cette partie, elle sera désormais déterminée par le nouveau cours donné à cette rivière pour son redressement."

^e "Il est convenu qu'à l'avenir les Confins entre les États de Sa Majesté Britannique, et ceux de Sa Majesté Très-Chrétienne, en cette Partie du Monde, seront irrévocablement fixés par une Ligne tirée au Milieu du Fleuve Mississippi, depuis sa Naissance jusqu'à la Rivière d'Iberville, & de-là par une Ligne tirée au Milieu de cette Rivière, & des Lacs Maurepas & Pontchartrain, jusqu'à la mer."

May 24, 1772. France-Liege. Treaty regarding boundaries, mutual commerce, and freedom of communications. *Meuse*. R. 1st ed. I: 294.

"The boundary thus formed by the Massambre creek shall be continued along the Thalweg of the Meuse between the said territory of Héer-Liège and that of Aigmont-François."^a

August 31, 1784. Austria-Bavaria. Treaty for the permanent adjustment of the boundaries of the Inn quarter. *Danube, Inn, Salza*. R. 2nd ed. 3: 754:

"Art. I. The Danube, the Inn and the Salza shall form, in accordance with the treaty of Teschen, the boundaries of the part of Bavaria which was ceded to the Archducal House of Austria.

"Art. II. The shores, islands, and meadows adjacent to said rivers, as well as the accretions of land and the rights of territorial superiority thereover, shall be divided and determined by the thalweg, and this in such a manner that everything situated on the right shall form part of the Inn quarter, and what extends on the left side shall belong to Bavaria. * * *

"The treaty of Teschen has already provided that neither of the two contracting parties shall alter the natural course of the rivers. However, this stipulation shall not prevent either party from taking necessary measures to protect their respective possessions against the irruption of the waters; provided that, according to the greater or lesser importance of these works, they shall not be undertaken by one party unless the other party is notified."^b

July 14, 1786. Great Britain-Spain. Convention relative to America. *Sibun, Wallis*. B. and F. St. P. I: 656:

"The English Line, beginning from the Sea, shall take the centre of the River Sibun or Jabon, and continue up to the source of the said River; from thence it shall cross in a straight line the intermediate land, till it intersects the River Wallis; and by the centre of the same river, the said Line shall descend to the point where it will meet the Line already settled."

^a "La limite ainsi formée par le ruisseau de Massambre sera continuée par le fil d'eau de la Meuse entre le dit territoire de Héer-Liège, & celui d'Aigmont-François."

^b "Art. I. Le Danube, l'Inn et la Salza formeront, conformément au traité de Teschen, les limites de la partie de la Bavière qui a été cédée à la maison archiducal d'Autriche.

"Art. II. Les rivages, les isles et les près adjacens auxdites rivières, ainsi que les atterrissemens et les droits de supériorité territoriale sur iceux, seront partagés et déterminés par le fil d'eau, et cela de la manière que tout ce qui se trouvera à sa droite fera partie du quartier de l'Inn, et ce qui s'étendra du côté gauche appartiendra à la Bavière * * *.

"Le traité de Teschen a déjà prévu qu'aucune des deux parties contractantes ne pourra altérer le cours naturel des rivières. Cependant cette stipulation n'empêchera pas que l'une et l'autre partie ne prennent les mesures nécessaires pour garantir leurs possessions respectives de l'irruption des eaux; bien entendu que, suivant le plus ou moins d'importance de ces travaux, ils ne pourront être entrepris par une partie, sans que l'autre en soit prévenue."

Oct. 27, 1795: United States-Spain. Treaty of friendship, limits and navigation. *Apalachicola, St. Mary's, Mississippi*. R. 1st ed. 6 : 562, 564:

"The southern boundary of the United States, which divides their territory from the Spanish colonies of East and West Florida, shall be designated by a line, beginning on the river Mississippi, * * * which from thence shall be drawn due east, to the middle of the river Apalachicola or Catahouche, thence along the middle thereof to its junction with the Flint; thence straight to the head of St. Mary's river, and thence down the middle thereof to the Atlantic Ocean."

"It is likewise agreed, that the western boundary of the United States, which separate them from the Spanish colony of Louisiana, is in the middle of the channel or bed of the river Mississippi."

February 9, 1801. France-Austria. Treaty of Peace. Adige. R. 1st ed. 7 : 539:

"The Thalweg of the Adige serving as a line of demarkation; and inasmuch as the cities of the Verone and Porto-Legnago will be divided by this line, there shall be established at the middle of the bridges of said cities draws to mark the separation." ^a

Aug. 15, 1804. France-Germany. Convention on the dues for navigation on the Rhine. R. 4, supplement, 37:

"Consequently, although the thalweg of the Rhine forms, as regards sovereignty, the boundary between France and Germany, the Rhine shall always be considered, with respect to navigation and commerce, as a common river between the two empires." ^b

July 11, 1807: Russia-France-Italy. Treaty of Peace. *Bug, Lossosna, Narew*. R. 4, supplement, 439:

"In order to establish, as far as possible, natural boundaries between Russia and the duchy of Warsaw, the territory circumscribed by the part of the present Russian boundaries which extend from the Bug to the mouth of the Lossosna and in a straight line leaving said mouth and following the Thalweg of this river, the thalweg of the Bobra to its mouth, the thalweg of the Narew from the aforementioned point to Suratz, from the Lisa to its source, near the village of Mien, from the affluent of the Nurzeck arising near the same village, from the Nurzeck to its mouth above Nurr, and finally the thalweg of the Bug, ascending it to the present

^a "Le Thalweg de l'Adige servant de ligne de délimitation; et comme par cette ligne les villes de Verone et de Porto-Legnago se trouveront partagées, il sera établi sur le milieu des ponts desdites villes, des ponts levis qui marqueront la séparation."

^b "En conséquence, quoique le Thalweg du Rhin forme, quant à la Souveraineté, la limite entre la France et l'Allemagne; le Rhin sera toujours considéré sous le rapport de la Navigation et du Commerce, comme un fleuve commun entre les deux Empires."

Russian boundaries shall be joined forever to the Empire of Russia."^a

October 10, 1807: France—(Italy)—Austria. Additional convention on peace and boundaries. *Isonzo*. R. 4 supplement, 469, 470:

The thalweg of the Isonzo shall be the boundary of the Kingdom of Italy and of the Austrian provinces situated on the left bank of its mouth. * * *

"The island of Morosigna, being situated on the right bank of the principal arm of the Isonzo, will remain in possession of the Kingdom of Italy."^b

September 17, 1808. Baden-Argovie. Treaty. *Rhine*. N. R. 1: 140:

"The thalweg of the Rhine shall constitute the territorial boundary between the grand duchy of Baden and the Canton of Aargau. By thalweg shall be understood the greatest depth of the flowing stream until another meaning is agreed upon.

"Where both countries are connected by bridges over this river, each sovereign shall have sovereignty over the half which is situated on his territory on the same side of the Rhine. On the middle of these bridges, or if this is impossible, at the least distance from the middle point, a boundary mark is to be erected by mutual agreement, but on the bridge at Rheinfelden this mark shall not be nearer the city than at the southern end of the outside bridge.

"However, no change shall be made by the foregoing definition of the boundary in the ecclesiastical relations of the St. Anthony chapel on the Rhine bridge at Lauffenburg and its assignment to the diocese of the Bishop of Fasel or of the Bishop who in future may take his place."^c

^a "Afin d'établir, autant qu'il est possible, des limites naturelles entre la Russie et la duché de Varsovie, le territoire circonscrit par la partie des frontières russes actuelles, qui s'étend depuis le Bug jusqu'à l'embouchure de la Lossosna et par une ligne partant de la dite embouchure et suivant le Thalweg de cette rivière, le Thalweg de la Bobra jusqu'à son embouchure, le Thalweg de la Narew, depuis le point susdit jusqu'à Suratz, de la Lisa jusqu'à sa source, près le village de Mien, de l'affluent de la Nurzeck prenant sa source près le même village, de la Nurzeck jusqu'à son embouchure au dessus de Nurr, et enfin le Thalweg du Bug, en le remontant jusqu'aux frontières russes actuelles sera réuni, à perpétuité à l'Empire de Russie."

^b "Le Thalweg de l'Isonzo sera la limite du Royaume de l'Italie et des provinces Autrichiennes situées sur la rive gauche de son embouchure, * * *

"L'Isle Morosigna étant située sur la rive droite du bras principal de l'Isonzo restera au Royaume d'Italie."

^c "Zwischen dem Grossherzogthum Baden und dem Canton Aargau solle der Thalweg des Rheins die Landesgrenze ausmachen. Unter der Benennung des Thalwegs wird in so lange die grösste Tiefe des fliessenden Stromes verstanden, als man sich nicht über eine andere Bestimmung vereinigt.

Wo beide Länder durch Brücken über diesen Fluss zusammenhängen, steht einen jeden Landesherrn die Landeshoheit auf diejenige Hälfte derselben zu, welche sich mit seinem Gebiete auf der nämlichen Rheinseite befindet. Auf der Mitte derselben, oder wenn dieses unthunlich wäre, in der mindesten Entfernung von dem Mittelpunkt, solle mit beiderseitiger Einverständniss ein Grenzzeichen errichtet,

March 7-19, 1810. Austria-Russia. Act of cession and of demarkation. *Dniester*. N. R. 1:253, 254:

"The line of demarkation follows the course of the Dniester
* * *

"The islands of the Dneister, which must belong to one or the other power shall be determined by the thalweg or channel of this river, that is, all those lying to the left of the thalweg or channel shall belong to his Majesty the Emperor of all the Russias, and all those to the right to his Majesty the Emperor of Austria." ^a

Nov. 8-20, 1810. Sweden-Russia. Act of demarkation of boundaries. *Tornea, Muonis, Kongama*. N. R. 1:315:

"The islands situated to the east of the greatest depth of the lakes and of the channel or thalweg of the three rivers mentioned above, shall belong to Russia, and those to the west of the same line to Sweden, with the sole exception of the peninsula of Svenfaroe, on which is situated the city of Tornea * * *

"As the Tornea, Muonis and Kongama rivers forming the boundary between the two nations, it is understood that they shall henceforth separate every piece of private property situated on the two opposite shores, so that the person having possession thereof shall be obliged to abandon one or the other side of the river." ^b

May 14, 1811. Russia-Westphalia. Convention on boundaries and rights of navigation. *Elbe*. N. R. 1:382:

"Art. I. In order to avoid any contest in the exercise of the territorial and sovereign rights on the boundaries of the two nations, the high contracting parties agree to recognize the thalweg as the boundary, that is, the principal current of the Elbe, wherever the two nations are separated by this river.

solches jedoch auf der Brücke zu Rheinfelden nicht näher gegen die Stadt, als an dem südlichen Ende der äussern Brücke aufgestellt werden.

"Durch vorstehende Bestimmung der Landesgrenze soll jedoch in den kirchlichen Verhältnissen der St. Antoni-Kappelle auf der Rheinbrücke zu Lauffenburg und deren Zuweisung an die Diözes des Bischofs von Basel oder desjenigen, der künftig an dessen Stelle tritt, keine Veränderung statt haben."

^a "La ligne de démarcation suit le cours du Dniestre. * * *

"Les îles du Dniester, qui doivent appartenir à l'une ou à l'autre Puissance, seront déterminées par le Thalweg ou Chenal de ce fleuve, c'est à dire, que toutes celles gissant à la gauche du Thalweg ou Chenal, appartiendront à S. M. l'Emp. de toutes les Russies; toutes celles à la droite à S. Maj. l'Emp. d'Autriche."

^b "Toutes les îles situées, à l'est de la plus grande profondeur des lacs et du chenal ou Thalweg des trois fleuves nommés ci dessus, appartiennent à la Russie, et celles à l'ouest de la même ligne à la Suède, à l'exception seule de la presqu'île Svenfaroe, sur laquelle se trouve la ville de Tornea. * * *

"Les rivières Tornea, Muonis et Kongama faisant frontière entre les deux États, il est entendu qu'elles sépareront désormais toute propriété particulière, situées sur les deux rives appossées, de manière que celui qui en a la possession, sera obligé d'abandonner l'un ou l'autre côté du fleuve."

"Art. II. As the current usually followed by the boats varies in the Elbe according to the stage of the more or less high waters, commissioners shall be appointed by both parties to proceed in the low water season, to demarkate the thalweg which is to fix the limits between the two nations, starting from the upper point where the Elbe begins to flow between the two kingdoms up to the point, below Magdebourg, where it leaves the Prussian territory.

"Art. III. The islands, islets, lowlands, and pastures situated in the Elbe on the left side of the thalweg, determined as stated in the foregoing article, shall belong to Westphalia, and those on the right side shall belong to Prussia. The fishery rights of the two nations shall be fixed and controlled in accordance with the same rules."^a

May 30, 1814. The Allies-France. Treaty of Peace. *Rhine*.
N. R. 2:4:

"From this radius, which shall remain as it was in 1792, the new boundary shall follow the arm of the river Queich which, upon quitting this radius, near Queichheim (which shall remain in the possession of France), passes near the villages of Mertenheim, Knittelsheim, and Belheim (which also remain French), as far as the Rhine, which shall continue thereafter to constitute the boundary between France and Germany.

"As to the Rhine, the thalweg shall constitute the boundary, in such a way, however, that the changes undergone in future by the course of this river shall not hereafter have any effect on the ownership of the islands situated therein; the status of ownership of these islands shall be restored to where it was at the time of the signature of the treaty of Luneville."^b

^a "Art. I. Pour éviter toute contestation dans l'exercice des droits territoriaux et de Souveraineté sur les confins des deux États, les hautes parties contractantes sont convenues de reconnaître pour frontière le Thalweg, c'est à dire le principal courant de l'Elbe partout où les deux États sont séparés par ce fleuve.

"Art. II. Comme le courant que suivent ordinairement les bateaux varie dans l'Elbe selon l'état des eaux plus ou moins hautes, il sera nommé des Commissaires de part et d'autre, pour procéder dans la saison des basses eaux à la démarcation du Thalweg qui fixera les limites entre les deux États, à partir du point supérieur où l'Elbe commence à couler entre les deux Royaumes jusqu'à celui, au dessous de Magdebourg, où il quitte le territoire Prussien.

"Art. III. Les Iles, Ilots, Bas-lieux et pâturages qui se trouvent dans l'Elbe du côté gauche du Thalweg, déterminé ainsi qu'il est dit en l'article précédent, appartiendront à la Westphalia, ceux du Côté droit appartiendront à la Prusse. Le droit de pêche des deux États est fixé et sera restéint d'après les mêmes principes."

^b "De ce rayon, qui reste ainsi qu'il étoit en 1792, la nouvelle frontière suivra le bras de la rivière de la Queich qui, en quittant ce rayon, près de Queichheim (qui reste à la France), passe près des villages de Mertenheim, Knittelsheim et Belheim (demeurant également François), jusqu'au Rhin, qui continuera ensuite à former la limite de la France et de l'Allemagne.

"Quant au Rhin, le Thalweg constituera la limite, de manière cependant que les changemens que subira par la suite le cours de ce fleuve n'aurent à l'avenir aucun effet sur la propriété des îles qui s'y trouvent; l'état de possession de ces îles sera rétabli tel qu'il existoit à l'époque de la signature du traité de Lunéville."

April 21-May 8, 1815. Russia-Austria. *Traité relatif à la Pologne. Vistula.* B. F. and St. P. 2:57:

"Le Thalweg de la Vistule séparera la Galicie du Territoire de la Ville Libre de Cracovie."^a

June 9, 1815. Congress of Vienna. *Acte. Prosna, Vistula, Rhine, Nahe, Sarre, Moselle, Sur, Po.* Br. F. and St. P. 2:11, 12, 20, 21, 47.

"From that point the course of the river Prosna as far as the village of Koscielnawies one league from the city of Klisch. The mid-channel of the Vistula shall separate Galicia from the Territory of the Free Town of Cracow. * * *

"This boundary shall begin on the Rhine at Bingen; it will follow the course of the Nahe upstream until that river meets the Glan, then the Glan as far as the village of Medart below Lauterecken. * * *

"The line shall follow the Sarre downstream until it flows into the Moselle; then the Moselle upstream to its confluence into the Sur, that last river up to the mouth of the Our, and the Our as far as the limits of the former department of the Ourthe. The places crossed by those rivers shall nowhere be divided but shall belong with their outskirts to the Power in whose territory the greater part of said places is situated. The rivers themselves as far as they form the dividing line shall be the common property of the two adjoining Powers. * * *

"In the region of the State of Parma, Plaisance, and Guastalla, the course of the Po, the dividing line following the mid-channel of that river. * * *

"Wherever the mid-channel of the Po constitutes the boundary line, it is decreed that the changes hereafter occurring in the course of the river shall have in the future no effect on the ownership of the islands therein."^b

^a "The thalweg of the Vistula shall separate Galicia from the territory of the free town of Cracovia."

^b "De ce point on remontera le cours de la Rivière Prosna jusqu'au Village Koscielnawies à 1 lieue de la ville de Kalisch * * *

"Le Thalweg de la Vistule séparera la Gallicie du Territoire de la Ville Libre de Cracovie * * *

"Cette frontière commencera sur le Rhin à Bingen; elle remontera de là le cours de la Nahe jusqu'au confluent de cette rivière avec le Glan, puis la Glan jusqu'au Village de Medart au dessous de Lauterecken * * *

"La ligne descendra la Sarre jusqu'à son embouchure dans la Moselle; ensuite elle remontera la Moselle jusqu'à son confluent avec la Sur, cette dernière rivière jusqu'à l'embouchure de l'Our, et l'Our jusqu'aux limites de l'ancien Département de l'Ourthe. Les Endroits traversés par ces rivières ne seront partagés nulle part, mais appartiendront avec leur banlieue à la Puissance sur le terrain de laquelle la majeure

Nov. 20, 1815. Austria—Great Britain—Prussia—Russia—France.

Treaty of Peace of Paris. *Rhine*. N. R. 2: 686:

"The thalweg of the Rhine shall constitute the line of demarcation between France and the States of Germany, but the ownership of the islands, as it is to be fixed, in consequence of a new survey of the course of this river shall remain immutable whatever change this watercourse may undergo in the course of time. * * * Half of the bridge in Strasbourg and Kehl shall belong to France and the other half to the grand duchy of Baden."^a

July 20, 1819. Prussia—Austria—Great Britain—Russia. General recess of the territorial commission (provided for in the treaty of Vienna, June 9, 1815, and of Paris, November 20, 1815). N. R. 4: 622:

"As to the rivers and creeks which, according to the changes in boundary, arising from the treaty of this date, determine the new boundary, the middle of their course shall serve as the limit, excepting the Foron, which shall belong in whole to his Majesty and a passage of which shall not be subject to any duty."^b

Jan. 30, 1827. France—Baden. Treaty for the adjustment of boundaries. *Rhine*. N. R. 7: 124, 126.

"I. Property limit.

"Art. II. The old parish boundaries which at the time of the signing of the Luneville peace treaty constituted the boundary of ownership and possession, shall be restored and indicated on the ground by means of distinctive mark. Wherever these boundaries pass over terra firma, they shall be transferred to the arm of the Rhine, situated nearest the mainland, in which there is water at the time of observation of the average water * * *

"II. Limit of sovereignty * * *

"Art. VIII. The thalweg of the Rhine which constitutes the boundary between France and the German states, shall in future

partie de ces Endroits sera située. Les rivières elles-mêmes, en tant qu'elles formeront la Frontière, appartiendront en commun aux 2 Puissances limitrophes * * *

"Du côté des États de Parme, Plaisance et Guastalla, le cours du Po, la Ligne de Démarcation suivant le Thalweg de ce fleuve * * *

"La où le Thalweg du Po constituera la limite, il est statué que les changemens que subira par la suite le cours de ce fleuve, n'auront à l'avenir aucun effet sur la propriété des Iles qui s'y trouvent.

^a "Le Thalweg du Rhin formera la démarcation entre la France et les états de l'Allemagne; mais la propriété des isles, telle qu'elle sera fixée à la suite d'une nouvelle reconnaissance du cours de ce fleuve, restera immuable, quelques changemens que subisse ce cours par la fuite du tems * * * La moitié du pont entre Strasbourg et Kehl appartiendra à la France, et l'autre moitié au grand duché de Bade."

^b "Quant aux rivières et ruisseaux qui d'après les changemens de limite résultans du traité de ce jour déterminent la nouvelle frontière, le milieu de leurs cours servira de limite, en exceptant le Foron, lequel appartiendra en entier à S. M. et dont le passage ne sera assujetti à aucun droit."

also designate the limit of sovereignty between France and the grand duchy of Baden.

"IX. The thalweg of the Rhine is the most appropriate channel for the navigation of the valley during the lowest ordinary water stage. In case a dispute should arise regarding two arms of the river, the arm which has the greatest continual depth in the course of the axis of its own thalweg shall be regarded as an arm of the main thalweg. By axis of the thalweg is meant the line of its course which is determined by the greatest depths following in uninterrupted succession.

"X. The thalweg shall be examined and determined in October of each year, after the subsidence of the high water, by a French and a Baden engineer officer with the assistance of a licensed pilot from each state, and the course shall be indicated by stakes.

"Art. XI. The thalweg once determined in this manner shall constitute the conventional limit of sovereignty between the two states, without regard to the changes which the actual thalweg may undergo in the interval between two examinations. The customs line must therefore not pass over this limit under any pretext.

"Art. XII. As the thalweg of the Rhine constitutes the limit of sovereignty between France and the grandduchy of Baden, this limit shall be subject to all consequences resulting from the periodical determination of the thalweg, always remaining the dividing line up to which the exercise of rights of sovereignty of each state extends.

"Art. XIII. Inasmuch, however, as these changes in the limits of sovereignty give rise to considerable disadvantages, consisting in the fact that the good understanding between the subjects of either party is often disturbed and certain portions of territory would be subject to constant changes in the form of national administration, which would cause annoyance in the exercise of property rights, it has been agreed that the right of pasturage, fishing, hunting, the gathering of driftwood, gold washing, and all other rights of usufruct, in so far as they are permissible under the existing laws of the state under whose sovereignty the property is situated, shall be allowed to be exercised even beyond the thalweg up to the unchangeable boundaries of the parishes of the two states.

"Art. XIV. Areas of land or water situated between the thalweg and the unchangeable property limit of the precincts of the riparian parishes at whatever time they may have arisen, shall belong fully to and be held by the parish whose boundary is intersected by the thalweg of the Rhine. Accretions of land which may form in future on the islands or the mainland shall belong to the parish which is owner of the boundary up to the

limit of its boundary; the portion of the accretion which extends beyond this limit shall belong to the contiguous parish."^a

April 19, 1839. Belgium-Netherlands. Treaty relating to the separation of their respective territories. *Sure*. N. R. 16:775:

"From Martelange said line shall descend the course of the *Sure*, the thalweg of which will serve as a boundary between the two states."^b

^a "I. *Eigenthumsgränze* * * *

"Art. II. Die alten Gemeindegrenzen, welche zur Zeit der Unterzeichnung des Lüneviller Friedens die Gränze des Eigenthums und des Besitzes bildeten, sind wieder herzustellen, und auf dem Terrain mittelst Unterscheidungsmarken, zu bezeichnen. Da, wo diese Gränzen über festes Land gehen, werden sie in den dem Festland zunächst gelegenen Rheinarm übertragen, in welchem sich zur Zeit der Beobachtung des Mittelwassers, Wasser befindet * * *

"II. *Hoheitsgränze* * * *

"Art. VIII. Der Thalweg des Rheins, welcher die Gränze zwischen Frankreich und den deutschen Staaten bildet, bestimmt auch in Zukunft die Hoheitsgränze zwischen Frankreich und dem Grossherzogthum Baden.

"Art. IX. Der Thalweg des Rheins ist der während des gewöhnlichen niedrigsten Wasserstandes für die Thalschiffahrt geeigneteste Weg. Im Fall dass über zwei Aarme des Flusses Streit entstehen sollte, so wird derjenige der beiden Aarme, welcher im Lauf der Achse seines eignen Thalwegs die fortlaufende grösste Tiefe hat, als ein Arm des Hauptthalwegs angesehen. Man nennt Achse des Thalwegs diejenige Linie seines Laufes, welche durch die ununterbrochen auf einander folgenden grössten Tiefen bestimmt ist.

"Art. X. Der Thalweg soll jedes Jahr im Monat October nach Abfluss des Hochwassers durch einen Französischen und Badischen Ingenieur-Offizier unter Zuziehung eines verpflichteten Steuermanns aus jedem Staat untersucht und bestimmt, auch dessen Lauf durch Pfähle bezeichnet werden.

"Art. XI. Der auf diese Art einmal bestimmte Thalweg bildet die conventionelle Hoheitsgränze zwischen beiden Staaten, ohne Rücksicht auf die Veränderungen, die der wirkliche Thalweg in der Zwischenzeit von einer Untersuchung zur andern erleiden könnte. Die Zolllinie darf daher solche unter keinem Vorwand überschreiten.

"Art. XII. Da der Thalweg des Rheins die Hoheitsgränze zwischen Frankreich und dem Grossherzogthum Baden bildet, so unterliegt diese Gränze allen Folgen, welche aus der periodischen Thalwegsbestimmung entstehen, indem sie stets die Scheidelinie bleibt, bis wohin, sich die Ausübung der Hoheitsrechte beider Staaten erstreckt.

"Art. XIII. Weil indessen durch diese Veränderungen der Hoheitsgränzen die bedeutenden Nachtheile entstehen, dass das gute Einverständniss der beiderseitigen Unterthanen oft gestört und einzelne Gebietstheile einem beständigen, für die Ausübung der Eigenthumsrechte sehr lästigen Wechsel der Staatsverwaltungsart unterworfen würden, so ist man übereingekommen, dass das Recht zum Weiden, Fischen, Jagen, zum Sammeln des angeschwemmten Holzes, zum Goldwaschen, so wie alle andere Nutzungsrechte, in soweit solche nach den bestehenden Gesetzen desjenigen Staates zulässig sind, unter dessen Hoheit sich das Eigenthum befindet, auch jenseits des Thalwegs bis zu den unveränderlichen Banngränzen der Gemeinden beider Staaten, ausgeübt werden dürfen.

"Art. XIV. Die zwischen dem Thalweg und der unveränderlichen Eigenthumsgränze der Gemarkungen der Ufergemeinden befindlichen Land- und Wasserflächen, zu welcher Zeit solche auch entstanden seyn mögen, sollen als volles Eigenthum derjenigen Gemeinde gehören und von ihr besessen werden, deren Bann vom Thalweg des Rheins durchschnitten wird. Die Verlandungen, welche sich in Zukunft sowohl an den Inseln, als an dem Festland bilden könnten, gehören der Gemeinde, welche Eigenthümerin des Banns ist, bis an die Gränze ihres Banns; derjenige Theil der Verlandungen, welcher sich über diese Gränze hinaus erstreckt, gehört der angrenzenden Gemeinde."

^b "De Martelange la dite ligne descendra le cours de la *Sure*, dont le Thalweg servira de limite entre les deux états.

Nov. 5, 1842. Belgium-Netherlands. Treaty on their boundaries and on the navigation of the inland waters. *Escaut*. N. R. G. 3:614, 615:

"From the point where this route, which belongs to the Kingdom of Belgium, crosses the Sure, the thalweg of this river shall continue to be the boundary between the two states, up to the place already decided on by the mixed boundary commission.

"The axis of the Terneuzen canal shall continue to form the boundary from the old fort St. Antoine to opposite the Netherlands customs office, in the village of Stuyver."^a

Nov. 10, 1859. Austria-France. Treaty of peace. *Mincio, Po*. N. R. G. 16:518:

"From the point of intersection thus designated with the Mincio, the boundary shall follow the thalweg of the river * * * shall follow the thalweg of the Po to Luzzara."^b

July 13, 1878. Germany-Austria-Hungary-France-Great Britain-Italy-Russia-Turkey. Treaty of Berlin. *Danube, Drina, Pruth*. N. R. G. 2d series, 3:451:

"The frontier follows on the north the right bank of the Danube from the former frontier of Servia up to a point to be determined by a European Commission. On the south the frontier follows upward from its mouth the mid-channel of the brook near which are situated the villages of Hodzakioj, Selam-Kioj, etc. The new frontier follows the existing line ascending the mid-channel of the Drina from its confluence with the Save. The Principality of Roumania restores to His Majesty the Emperor of Russia that portion of the Bessarabian territory detached from Russia by the Treaty of Paris of 1856, bounded on the west by the mid-channel of the Pruth, and on the south by the mid-channel of the Kilia Branch and the Stary-Stamboul mouth."^c

^a "Depuis le point où cette route, qui appartient au royaume de Belgique, traverse la Sure, le thalweg de cette rivière continuera la limite entre les deux États, jusqu'à l'endroit déjà arrêté par la commission mixte des limites.

"L'axe du canal de Terneuzen continuera à former limite depuis l'ancien fort St. Antoine jusqu'en face du bureau de la douane néerlandaise, au hameau de Stuyver."

^b "Du point d'intersection de la circonférence ainsi désignée avec le Mincio, la frontière suivra le Thalweg de la rivière * * * suivra le thalweg du Po jusqu'à Luzzara."

^c "La frontière suit, au Nord, la rive droite du Danube depuis l'ancienne frontière de Serbie jusqu'à un point à déterminer par une Commission. * * *

"Au Sud, la frontière remonte, depuis son embouchure, le thalweg du ruisseau près du quel se trouvent les villages Hodzakioj, Selam-Kioj, etc. * * *

"La nouvelle frontière suit le tracé actuel en remontant le thalweg de la Drina depuis son confluent avec la Save. * * *

"La Principauté de Roumanie rétrocède à S. M. l'Empereur de Russie la portion du territoire de la Bessarabie détaché de la Russie en suite du Traité de Paris de 1856, limitée à l'Ouest par le thalweg du Pruth, au midi par le thalweg du bras de Kilia et l'embouchure de Stary-Stamboul."

III. Occasionally, for one reason or another, nations deem it advisable to draw their boundary lines so as to give the entire bed of the river to one nation or the other, making the boundary line follow one of the banks rather than the "thread" of the stream. Among such treaties are the following:

September 18, 1773. Austria. Treaty. *Vistula*. R. 1st ed. 4: 114:

"The right bank of the Vistula from Silesia to beyond Sendomir * * * as far as the environs of Zbaraz, thence in a straight line on the Dniester along the little river."^a

October 29, 1775. France-Treves. Conventions concerning boundaries. *Sarre*. R. 2nd ed. 2: 261:

"So that the Sarre will constitute in this part a natural boundary between the two sovereignties, from the point where it begins to flow between the respective nations. * * * It is nevertheless expressly agreed, by way of indemnity in favor of France, that the whole course and waters of the Sarre shall belong to it throughout the extent which has just been indicated, save the rights of superiority and sovereignty of S. A. E. of Treves and of control of the right bank of said river."^b

Feb. 9, 1776. Austria-Poland. Act of agreement for fixing boundaries. *Bug*. R. 2, supplement, 132:

"The Bug shall henceforth form a natural boundary * * * with the understanding that the ownership of all the river in this part, together with the islands, shall be retained by his Majesty."^c

June 20, 1780. France-Basel. Convention concerning boundaries. *Doubs*. R. 2nd ed. 3: 319, 321, 322:

"Art. I. The line of separation of the sovereignties and jurisdiction of the Kingdom of France and of the principality of Basel * * * shall continue to be designated, as in the past, and shall be invariably formed by the river Doubs, in such a manner that the entire bed and the whole course of the water shall remain under the domination of France. * * *

^a "La rive droite de la Vistule depuis la Silesie jusqu'au delà de Sendomir * * * jusque dans les environs de Zbaraz, de là en droite ligne sur le Niester le long de la petite rivière."

^b "De manière que la Sarre fera en cette partie la limite naturelle entre les deux souverainetés, depuis le point où elle commence à couler entre les états respectifs. * * * Il est néanmoins expressément convenu, par forme de dédommagement en faveur de la France, que tout le cours et les eaux de la Sarre lui appartiendront dans l'étendue qui vient d'être désignée, sauf les droits de supériorité et de souveraineté de S. A. E. de Trèves et de l'empire sur la rive droite de ladite rivière."

^c "Le Bug formera désormais une frontière naturelle * * * bien entendu que la propriété de toute la rivière dans cette partie ensemble avec les Isles, demeurera à Sa Majesté."

"Art. III. By virtue of this cession, and applying thereto the principles adopted in Article I above, the entire bed of the Doubs, with its watercourse, shall belong totally and exclusively to the crown of France throughout the extent of the seignior of Franquemont, as well as the Goumois bridge; the last extremity of this bridge, by which it is connected with the right bank of the Doubs, and the last waters of this river which immediately bathe the said bank, forming in this part, as they do above the Teufferet Mill, the boundary and dividing line between the two dominions; §§§§.

"Art. V. The Doubs river shall continue to form at this part the boundary between the two dominions, * * * in such a way, however, that its entire bed, and the whole water course, shall remain under the sovereignty and jurisdiction of France. * * * There shall not be constructed, neither on the left bank, or in the bed of this river, any jetties or other works whose mediate or immediate effects would be to change the course of the water, to increase its surface, or to submerge a part of the right bank." ^a

September 22, 1781. France-Leyen. Treaty on boundary and exchange. *Sarre, Bliese*. R. 2nd ed. 3:351:

"In all parts where the Sarre river and the Bliese river shall form henceforth the boundary between the two dominions, their whole bed and all the water course as enclosed between the two banks, as well as the bridges, shall remain under the sovereignty and jurisdiction of France * * *. There shall not be constructed on either bank of these rivers any jetties or other works the mediate or immediate effect of which would be to change the course of the water, increase its surface or to submerge the opposite bank." ^b

^a "Art. I. La ligne de séparation des souveraineté et ressort du royaume de France et de la principauté de Bâle * * * continuera d'être désignée, comme par le passé, et sera invariablement formée par la rivière du Doubs, de manière que le lit entier et tout le cours de l'eau, demeurent sous la domination de la France. * * *

"Art. III. En vertu de cette cession, et en y appliquant les principes adoptés dans L'Art. I ci-dessus, le lit entier du Doubs, avec son cours d'eau, appartiendra totalement et exclusivement à la couronne de France dans toute l'étendue de la seigneurie de Franquemont de même que le pont de Goumois; la dernière extrémité de ce pont, par où il tient à la rive droite du Doubs et les dernières eaux de cette rivière qui baignent immédiatement ladite rive, devant former en cette partie, comme elles la forment au-dessous du moulin de Teufferet, la limite et la ligne séparative entre les deux dominations; * * *

"Art. V. La rivière du Doubs continuera de faire en cette partie la limite entre les deux dominations, * * * de manière toutefois que son lit entier, et tout le cours d'eau demeureront sous la souveraineté et le ressort de la France * * * Il ne pourra être construit, ni sur la rive gauche, ni dans le lit même de cette rivière, aucunes jetées, ni autres oeuvres dont l'effet médiat ou immédiat seroit de changer le cours de l'eau, d'en augmenter la surface ou de submerger une partie de la rive droite."

^b "Dans toutes les parties, où la rivière de la Sarre et celle de la Bliese formeront désormais la limite entre les deux Dominations leur lit entier et tout le cours d'eau tel qu'il est enformé entre les deux rives ainsi que les ponts, demoureront sous la souveraineté et le ressort de la France. * * * Il ne pourra être construit ni sur l'une ni sur l'autre rive des dites rivières, aucunes jetées ni autres oeuvres dont l'effet médiat ou immédiat seroit, de changer le cours d'eau; d'en augmenter la surface, ou de submerger la rive opposée."

October 17, 1797. France-Austria. Treaty of Peace. *Adige, Tartaro, Po*. R. 1st ed. 7:210:

"The boundary line shall thereupon pass between the Adige at San Giacomo, will follow the left bank of this river to the mouth of the Blanc canal. * * * The line shall continue along the left bank of the Blanc canal, the left bank of the Tartaro, the left bank of the Polisella canal, up to the point where it empties into the Po, and the left bank of the great Po to the sea."

Secret articles attached to the preceding treaty, concerning the *Rhine*. R. 1st ed. 7:215:

"H. M. Emperor King of Hungary and Bohemia, agrees that the boundaries of the French Republic shall extend to the line designated below, and undertakes to use his good offices when peace is concluded with the German Empire in order that the French Republic may secure this same line. Namely: 'The left bank of the Rhine from the boundary of Switzerland below Basel to the confluence of the Nette above Andernach, including the bridge approach of Mannheim on the left bank of the Rhine and the city and fortress of Mayence.'"^a

May 28, 1812. Russia-Turkey. Treaty of Peace. *Pruth, Danube*. N. R. 3:399:

"Art. IV. It has been determined by article 1 of the preliminaries that the Pruth river shall constitute the boundary between the two powers from the point where it enters the Moldau to its confluence with the Danube, and from this point to the left shore of the latter stream to Kilia and its confluence with the Black Sea, shall constitute the boundary between the two powers."^b

^a "La ligne de limite passera ensuite entre l'Adige à San-Giacomo, suivra la rive gauche de cette rivière jusqu'à l'embouchure du canal Blanc. * * * La ligne se continuera par la rive gauche du canal Blanc, la rive gauche du Tartaro, la rive gauche du canal de la Polisella, jusqu'à son embouchure dans le Pô, et la rive gauche du grand Pô jusqu'à la mer."

Secret articles attached to the preceding treaty, concerning the *Rhine*. R. 1st ed. 7:215:

"S. M. L'Empereur Roi de Hongrie et de Bohême consent que les limites de la République Française s'étendent jusqu'à la ligne ci-dessous désignée, et s'engage à employer ses bons offices lors de la paix avec l'Empire Germanique pour que la République Française obtienne cette même ligne. Savoir:

"La rive gauche du Rhin depuis la frontière de la Suisse au dessous de Bâle jusqu'au confluent de la Nette au dessus d'Andernach, y compris la tête de pont de Mannheim sur la rive gauche du Rhin et la ville et forteresse de Mayence."

^b "Art. IV. Mittelst des ersten Artikels der Präliminarien ist festgesetzt worden, dass der Pruthfluss, von da, wo er in die Moldau eintritt, bis zu seiner Einmündung in Die Donau, von da aber das linke Ufer des letztgedachten Stroms bis Kilia und dessen Einmündung ins schwarze Meer, die Grenze zwischen beider Mächten bilden soll."

Feb. 22, 1819. United States-Spain. Treaty of amity, settlement and limits. *Sabine, Red, Arkansas*. N. R. 5:331:

"The boundary line between the two countries, west of the Mississippi, shall begin on the Gulph of Mexico, at the mouth of the river Sabine in the sea, continuing north, along the western bank of that river * * * thence following the course of the Rio Roxo [Red River] westward, * * * thence following the course of the southern bank of the Arkansas to its source * * * all the islands in the Sabine and the said Red and Arkansas rivers throughout the course thus described, to belong to the United States."

Sept. 2-14, 1829. Russia-Turkey. Treaty of Peace. *Danube*. N. R. 8:144.

"The Pruth shall continue to form the boundary between the two empires, from the point where this river touches the territory of Moldavia to its confluence with the Danube. From this place the boundary line shall follow the course of the Danube to its junction with the St. Georges, so that, leaving all the islands formed by the different arms of this river in possession of Russia, the right shore thereof shall remain as in the past in possession of the Ottoman Porte. It is nevertheless agreed that this right shore, starting from the point where the St. Georges arm separates from the Soulineh arm, shall remain uninhabited for a distance of two hours from this river."^a

IV. The fourth class of treaties not content with making the middle of the river or thalweg the boundary line with the consequent fluctuations in the boundary line due to the changing in the course of the river, due to slow and gradual alluvion, specifies that the thalweg at some date shall be regarded as a fixed line from which there shall be no departure irrespective of future changes in the course of the river. Treaties of this kind are few, but the following have been noted:

May 14, 1811. Russia-Westphalia. Convention on boundaries and rights of navigation. *Elbe*. N. R. 1:382.

"Art. IV. A map of the course of the Elbe shall be drawn up, on which the thalweg shall be designated by fixed points on either bank; it shall, as recognized by the special commissioners, constitute the boundary which is to determine at this part the limits of the territorial and sovereign rights between the two nations.

^a "Le Pruth continuera à former la limite des deux empires, du point où cette rivière touche le territoire de la Moldavie jusqu'à son confluent avec le Danube. De cet endroit la ligne des frontières suivra le cours du Danube jusqu'à l'embouchure de St. Georges, de sorte qu'en laissant toutes les isles formées par les différens bras de ce fleuve en possession de la Russie, la rive droite en restera comme par le passé à la Porte Ottomane. Il est convenu néanmoins que cette rive droite, à partir du point où le bras de St. Georges se sépare de celui de Soulinéh, demeurera inhabitée à la distance de deux heures de ce fleuve."

This boundary shall remain as marked on this map whatever changes may take place in the thalweg and even the course of the river in future, save the exception mentioned herein below.

"The islands, islets, and alluvion which may form in the Elbe shall belong to that one of the two nations on whose territory they are situated, according to the manner in which the boundary is fixed on the map made as prescribed above.

"If, however, the change which should take place in future in the course of the river should be such that in a part of the Elbe where each of the powers now possesses one shore, both the shores of the new main current should come under the domination of one of the two powers, then, with respect to this part, a new boundary delimitation shall be made so that the new thalweg shall serve there as a limit to the territorial and sovereign rights, though this shall not redound to the rights of property or usufruct.

* * * * *

"Art. VII. The high contracting parties agree that, although the thalweg of the Elbe may constitute the boundary between Westphalia and Prussia as far as sovereignty is concerned, the river shall always be considered with respect to navigation and commerce, as a common river between the two kingdoms wherever the two nations respectfully occupy the two opposite shores."^a

See also the treaty between France and Baden, January 30, 1827, quoted *supra*, the provisions of which concerning the thalweg and fixed boundary are peculiar in that the boundary line is fixed each year—an interesting recognition of the mutability of water boundaries.

With regard to the interpretation of the first two classes of treaties, i. e., treaties which fix the river or the middle of the river or

^a "Art. IV. Il sera dressé une Carte du cours de l'Elbe sur laquelle le Thalweg sera désigné par des points fixes sur l'une et l'autre rive; il formera tel qu'il aura été reconnu par les Commissaires spéciaux, la frontière qui doit fixer dans cette parties, les limites des droits territoriaux et de Souveraineté entre les deux Etats. Cette frontière restera telle qu'elle aura été marquée sur cette Carte quels que soient les changemens que le Thalweg et même le cours du fleuve éprouveraient par la suite, sauf l'exception énoncée ci-dessous.

"Les Iles, les Ilots et les alluvions qui viendraient à se former dans l'Elbe appartiendront à celui des deux Etats sur le territoire duquel ils se trouveront, d'après la fixation qui aura été faite de la frontière dans la Carte dont la levée est cidessus prescrite.

"Si cependant le changement qui surviendrait dans la suite dans le cours du fleuve était tel que dans une partie de l'Elbe dont aujourd'hui chacune des deux puissances possède une rive, les deux rives du nouveau courant principal tomberaient sous le domination de l'une des deux puissances, alors il sera procédé pour cette partie à une nouvelle délimitation de frontière de sorte que le nouveau Thalweg y serve de limite pour les droits territoriaux et de Souveraineté, mais sans que ceci puisse porter atteinte aux droits de propriété ou d'usufruit.

* * * * *

"Art. VII. Les hautes parties contractantes sont convenu, quoique le Thalweg de l'Elbe forme, quant à la Souveraineté, la limite entre la Westphalie et la Prusse, que le fleuve sera toujours considéré sous le rapport de la navigation et du Commerce comme un fleuve commun entre les deux Royaumes partout où les deux Etats occupent respectivement les deux rives opposées."

thalweg simpliciter, it seems never to have been questioned that the doctrine of international law, that the boundary varies with changes in the channel wrought by slow and gradual deposit of alluvion and remains in the abandoned channel in the case of avulsion, prevails. It would be useless pedantry to pile up authorities on this point in addition to those mentioned by Attorney General Cushing in his opinion on arcifinious boundaries, which forms the storm center of the proposition now under discussion. Furthermore, there is no difference of opinion between the United States and Mexico on this point before this honorable tribunal, inasmuch as the Mexican case says:^a

"If the text of the Boundary Treaty had not read but what it appears to read in the quotation made therefrom by Mr. Caleb Cushing, he would have been more than right, and the doctrines of the authorities on International Law, which he invokes, would have been in every way applicable; but the treaty contains precise and most clear precepts, which were altogether omitted, or inadvertently forgotten."

It will be remembered that the treaty provision discussed in Mr. Cushing's opinion is that portion of the Gadsden Treaty which provides that the boundary line "'beginning in the Gulf of Mexico, three leagues from land, opposite the mouth of the Rio Grande' shall proceed thence 'up the middle of the river' to a certain point."^b

We approach the question of the construction and language of the treaties of 1848 and 1853 therefore in the light of the knowledge that the Rio Grande had at the date of the treaty, served for one hundred and fifty years as an international boundary; in the light of the presumption of international law, favoring arcifinious boundaries; in the light of the general practice of nations in framing conventional arrangements for boundaries, and in the light of the unanimous opinion of the writers of international law in which the Mexican agent concurs that in case these conventional arrangements provide simpliciter that the line shall be traced along the middle of the river or the thalweg, the ordinary principles of international law as regards accretion and avulsion, obtain.

THE LANGUAGE OF THE TREATIES.

The pertinent language of the treaties is here reproduced for more convenient reference.

^a Mexican case, p. 41.

^b Attorney General Cushing, United States Countercase, Appendix, p. 559.

Article 5 of the Treaty of Guadalupe Hidalgo:

ARTICLE V.

The Boundary line between the two Republics shall commence in the Gulf of Mexico, three leagues from land, opposite the mouth of the Rio Grande, otherwise called Rio Bravo del Norte, or opposite the mouth of it's deepest branch, if it should have more than one branch emptying directly into the sea; from thence, up the middle of that river, following the deepest channel, where it has more than one to the point where it strikes the Southern boundary of New Mexico; thence, westwardly along the whole Southern Boundary of New Mexico (which runs north of the town called *Paso*) to it's western termination; thence, northward, along the western line of New Mexico, until it intersects the first branch of the river Gila; (or if it should not intersect any branch of that river, then, to the point on the said line nearest to such branch, and thence in a direct line to the same;) thence down the middle of the said branch and of the said river, until it empties into the Rio Colorado; thence, across the Rio Colorado, following the division line between Upper and Lower California, to the Pacific Ocean.

The southern and western limits of New Mexico, mentioned in this Article, are those laid down in the Map, entitled "*Map of the United Mexican States, as organized and defined by various acts of the Congress of said Republic, and constructed according to the best authorities. Revised edition. Published at New York in 1847 by J. Disturnell.*" Of which Map a Copy is added to this Treaty, bearing the signatures and seals of the Undersigned Plenipotentiaries. And, in order to preclude all difficulty in tracing upon the ground the limit separating Upper from Lower California, it is agreed that the said limit shall consist of a straight line, drawn from the middle of the Rio Gila, where it unites with the Colorado, to a point on the Coast of the Pacific Ocean, distant one marine league due south of the southernmost point of the Port of San Diego, according to the plan of said port, made in the year 1782, by Don Juan Pantoja, second sailing-Master of the Spanish fleet, and published at Madrid in the year 1802, in the Atlas to the voyage of the schooners *Sutil* and *Mexicana*: of which plan a Copy is hereunto added, signed and sealed by the respective Plenipotentiaries.

In order to designate the Boundary line with due precision, upon authoritative maps, and to establish upon the ground landmarks which shall show the limits of both Republics, as described in the present Article, the two Governments shall each appoint a Commissioner and a Surveyor, who, before the expiration of one year from the date of the exchange of ratifications of this treaty, shall meet at the Port of San Diego, and proceed to run and mark the said Boundary in it's whole course to the mouth of the Rio Bravo del Norte. They shall keep journals and make out plans of their operations; and the result, agreed upon by them, shall be deemed

a part of this treaty, and shall have the same force as if it were inserted therein. The two Governments will amicably agree regarding what may be necessary to these persons, and also as to their respective escorts, should such be necessary.

The Boundary line established by this Article shall be religiously respected by each of the two Republics, and no change shall ever be made therein, except by the express and free consent of both nations, lawfully given by the General Government of each, in conformity with it's own constitution.

Article I of the treaty of 1853:

ARTICLE Ist

The Mexican Republic agrees to designate the following as her true limits with the United States for the future, Retaining the same dividing line between the two California's, as already defined and established according to the 5th Article of the Treaty of Guadalupe Hidalgo, the limits between the Two Republics shall be as follows: Beginning in the Gulf of Mexico, three leagues from land, opposite the mouth of the Rio Grande as provided in the fifth article of the treaty of Guadalupe Hidalgo, thence as defined in the said article, up the middle of that river to the point where the parallel of $31^{\circ} 47'$ north latitude crosses the same, thence due west one hundred miles, thence south to the parallel of $31^{\circ} 20'$ north latitude, thence along the said parallel of $31^{\circ} 20'$ to the 11th meridian of longitude west of Greenwich, thence in a straight line to a point on the Colorado river twenty english miles below the junction of the Gila and Colorado rivers, thence up the middle of the said river Colorado until it intersects the present line between the United States and Mexico.

For the performance of this portion of the Treaty, each of the two Governments shall nominate one Commissioner to the end that, by common consent, the two thus nominated having met in the City of Paso del Norte, three months after the exchange of the ratifications of this Treaty may proceed to survey and mark out upon the land the dividing line stipulated by this article, where it shall not have already been surveyed and established by the Mixed Commission according to the Treaty of Guadalupe keeping a Journal and making proper plans of their operations. For this purpose if they should Judge it necessary, the contracting Parties shall be at liberty each to unite to its respective Commissioner, Scientific or other assistants, such as Astronomers and Surveyors whose concurrence shall not be considered necessary for the settlement and ratification of a true line of division between the two Republics; that line shall be alone established upon which the Commissioners may fix, their consent in this particular being considered decisive and an integral part of this Treaty, without necessity of ulterior ratification or approval, and without room for interpretation of any kind by either of the Parties contracting.

The dividing line thus established shall in all time be faithfully respected by the two Governments without any variation therein, unless of the express and free consent of the two, given in conformity to the principles of the Law of Nations, and in accordance with the Constitution of each country respectively

In consequence, the stipulation in the 5th Article of the Treaty of Guadalupe upon the Boundary line therein described is no longer of any force, wherein it may conflict with that here established, the said line being considered annulled and abolished wherever it may not coincide with the present, and in the same manner remaining in full force where in accordance with the same.

It was in full view of the provisions of these articles that Attorney General Cushing rendered his opinion, already well known to the International Boundary Commission, holding that the ordinary rules of accretion and avulsion govern the changes of the course in the Rio Grande.

The relevant and controlling language in these articles, in the view of the United States, is the provision in article 5 of the Treaty of Guadalupe Hidalgo, that the boundary line shall run "up the middle" of the Rio Grande, and in article 1 of the Treaty of 1853, that it shall run "as defined in said article" (art. 5 of the treaty of Guadalupe) "up the middle of the Rio Grande." The relevant language of the two treaties from the viewpoint of the United States and from the viewpoint of Attorney General Cushing's opinion is precisely the same. The Mexican case maintains, however, that other expressions in the above-quoted articles take this case out of the scope of the authorities relied upon by Attorney General Cushing.

The Mexican Case relies upon the subsequent phraseology providing for the designation of commissioners, and defining their powers and duties. The expressions of the two treaties in this respect are not quite identical.

•The United States does not regard this difference as material on any theory, nevertheless, there is a difference growing out of the circumstances under which the two treaties were negotiated and the subject matter to which they related.^a And it seems clear

^a Message of the President of the United States, December, 1852, U. S. Case, Appendix, p. 1131.

Message of the President of the United States, December, 1853, U. S. Case, Appendix, p. 1132.

Mr. Marcy to Mr. Gadsden, July 15, 1853, U. S. Case, Appendix, p. 543.

Maj. Emory to Mr. Stuart, Oct. 1, 1852, U. S. Case, Appendix, pp. 1065, 1067, 1068.

Maj. Emory's report, dated July 29, 1856, U. S. Case, Appendix, p. 1069 at 1072, 1073. Joint Journal International Boundary Commission, Dec. 3, 1850, Mexican Case, annex 12, XV, XX.

Joint Journal of Sept. 6, 1851, Mexican Case, annex 12, XLIX, LI.

Joint Journal, Dec. 20, 1850, Mexican Case, annex 12, XXV, XXX.

Joint Journal, Dec. 25, 1850, Mexican Case, annex 12, XXX, XXXIV.

that as regards the powers and duties of the Commissioners only the provisions of the treaty of 1848 apply to the water boundary along the Rio Grande, especially between El Paso and Juarez.

As was pointed out in the countercase of the United States, the provisions of the treaties exclude the possibility that the boundary line at any point should have been "surveyed and established" under both treaties.^a

The facts and the record clearly show that the river line in general, and the line between El Paso and Juarez particularly, was surveyed and established under the Treaty of 1848.^b

It is only necessary, therefore, in considering the fixed line theory now propounded by the Government of Mexico to examine the provisions of the treaty of 1848. The provisions specifically relied upon by the Government of Mexico are the following:

"In order to designate the Boundary line with due precision, upon authoritative maps, and to establish upon the ground landmarks, which shall show the limits of both Republics, as described in the present Article, the two Governments shall each appoint a Commissioner and a Surveyor, who, before the expiration of one year from the date of the exchange of ratifications of this treaty, shall meet at the Port of San Diego, and proceed to run and mark the said Boundary in it's whole course to the mouth of the Rio Bravo del Norte. They shall keep journals and make out plans of their operations; and the result, agreed upon by them, shall be deemed a part of this treaty, and shall have the same force as if it were inserted therein. The two Governments will amicably agree regarding what may be necessary to these persons, and also as to their respective escorts, should such be necessary.

"The Boundary line established by this Article shall be religiously respected by each of the two Republics, and no change shall ever be made therein, except by the express and free consent of both nations, lawfully given by the General Government of each, in conformity with it's own constitution."^c

^a See Countercase of the United States, pp. 9-11.

^b Maj. Emory to Mr. Stuart, Oct. 1, 1852, U. S. Case Appendix, pp. 1065, 1066.

Maj. Emory's report to the Secretary of the Interior of July 29, 1856, U. S. Case Appendix, pp. 1069, 1071, 1072.

Message of the President of the United States, December 1852, U. S. Case Appendix, p. 1131.

Technical Report of D. Augustin Diaz, Mexican Case Annex 3, V to X.

Joint Journal of the Boundary Commission under the treaty of 1848, Mexican Case Annex 12, XV to LXXVIII, particularly LIII, LIV, LXIII.

Joint Journal of the Nineteenth Meeting of the International Boundary Commission, September 18, 1852, Mexican Case Appendix, LV, LXVII at LXV.

Joint Journal of the Twentieth Meeting of the International Boundary Commission, September 30, 1852, Mexican Case Appendix LXXII, LXXVIII, especially LXVII. Art. 3, Treaty of 1884, U. S. Case Appendix, p. 69.

^c U. S. Case, Appendix, p. 22.

This language is largely taken from article 3 of the treaty between the United States and Mexico of 1828, which, in turn, is taken in toto from the treaty between the United States and Spain in 1819. Nothing has been found in the archives of the United States with reference to the two prior treaties or to the treaty of 1848 which indicates that this language had any special significance beyond merely providing for commissioners to lay down the boundary line between the two countries, and there appears to be nothing in any other article of the treaty of Guadalupe Hidalgo which indicates the intention on the part of either of the two countries to lay down any special or peculiar rule different from the ordinary rule obtained between nations which have contracted for a fluvial boundary. Indeed, article 7 of the treaty, which refers to the rivers Gila and Bravo being divided in the middle between the two republics and secures their common and beneficial navigation, and many other references in subsequent treaties to the Rio Grande as a fluvial boundary,^a tend strongly to show that the ordinary arrangement between nations was in the contemplation of the high contracting parties. It is, however, in a construction alleged to have been placed upon the treaty by the commissioners appointed thereunder, a construction which it was alleged was within their competence under the treaty, that the Mexican Case most especially relies.

THE CONSTRUCTION OF THE TREATY OF GUADALUPE HIDALGO BY THE
BOUNDARY COMMISSION.

The Mexican Case regards the views of the boundary commissioners under the treaty of 1848 as to the effect of the fluctuations in the Rio Grande on the boundary line, as of "transcendental importance"^b in the construction of the treaty. The United States is wholly unable to share this view. The Mexican Case observes that the commissioners "considered it their duty to discuss the interpretation which should be given to the treaty, in the part relative to the changes of course which might occur in the Rio Grande",^c and the Mexican Countercase refers to certain views spread on the journals of the commission as "the interpretation of the treaties * * * established by the only persons with a right to make such interpretation."^d The United States, on the other hand, submits that any discussion on the part of the commissioners appointed under the treaty of 1848 as to the legal effect

^a See Conventions of 1884, 1889, 1905.

^b Mexican Case, pp. 35-38.

^c Mexican Case, p. 35.

^d Mexican Countercase, p. 37.

of subsequent fluctuations in the river channel was absolutely *ultra vires*. It is submitted that the *a priori* improbability that any two governments would hand over to two commissioners appointed for the purpose of running a boundary line the absolute authority to construe the provisions of the boundary treaty generally is such as to negative any such result, unless plainly required by the language of the treaty.

The treaty of 1848 defines the duties of the boundary commissioners as follows:

"In order to designate the Boundary line with due precision, upon authoritative maps, and to establish upon the ground landmarks which shall show the limits of both Republics, as described in the present Article, the two Governments shall each appoint a Commissioner and a Surveyor, who, before the expiration of one year from the date of the exchange of ratifications of this treaty, shall meet at the Port of San Diego, and proceed to run and mark the said Boundary in it's whole course to the mouth of the Rio Bravo del Norte. They shall keep journals and make out plans of their operations; and the result, agreed upon by them, shall be deemed a part of this treaty, and shall have the same force as if it were inserted therein. The two Governments will amicably agree regarding what may be necessary to these persons, and also as to their respective escorts, should such be necessary."^a

It seems clear from this passage that the functions of the commission were "to designate the boundary line with due precision upon authoritative maps and to establish upon the ground landmarks which shall show the limits of both republics" and furthermore "the result agreed upon by them shall be deemed a part of this treaty and shall have the same force as if it were inserted therein." The commission was empowered to keep journals as an incident to the exercise of these functions. It had no substantive and general power to keep journals for the general construction of the provisions of the treaty.

This view of the authority of the commission is borne out by all the documentary evidence, both contemporaneous and subsequent.^b

^a U. S. Case, Appendix, p. 22, *supra*, p. 30.

^b Instructions issued by the Departments of State and Interior to the commissioners under the treaties of 1848 and 1853, U. S. Countercase, Appendix, pp. 45 to 59, especially pages 47, 49, 54, 57.

Mr. Gadsden to Mr. Marcy, U. S. Case Appendix, 548, enclosures at 549, 551.

Mr. Marcy to Mr. Gadsden, July 15, 1853, U. S. Case Appendix, 543 at 545, 546.

Opinion of Attorney General Cushing October 29, 1855, U. S. Countercase Appendix, p. 203.

Major Emory's report U. S. Case Appendix, p. 1074.

Mr. Frelinghuysen to Señor Romero, July 10, 1884, U. S. Case Appendix, 652 at 654.

The Mexican Countercase quotes, and apparently with approval, Secretary Marcy's views as to the finality of the decision of the commissioners and asks what importance Attorney General Cushing's opinion can have when "the commissioner and the surveyor of the United States, vested for the purpose with exclusive powers, had decided that the dividing line should be inviolable." ^a

Without stopping to consider whether everything which Secretary Marcy said in the communication referred to and relied on in the Mexican Case be sound it is sufficient to point out that Mr. Marcy limited his remarks as to the finality of the decision of the commissioners carefully to those cases where they were "acting in good faith in the matter committed to them by the treaty" ^b and added that "when not in conformity to the treaty" their acts had "no validity," and Secretary Marcy proceeded to show his understanding of the scope of the powers of the commissioners under the treaty of 1853 (which are instructive as regards this point ^c) by submitting the proposed report of the commissioners upon this very subject, namely, the effect of subsequent fluctuations of the river bed, to Attorney General Cushing for his opinion. It would seem clear that neither Secretary Marcy's words or actions offer any support for the Mexican contention with respect to the right of the commissioners under the treaty of 1848 to proceed to the general interpretation of the treaty by way of entries on their journals. But even if the commissioners under the treaty of 1848 had had authority to embody in "the result agreed upon by them" a construction of the legal effect of a subsequent fluctuation of the river bed upon the boundary line, it is conceived that they did not do so. The journal of the meeting of July 20, 1851 at Santa Rita del Cobra, ^d upon which the Mexican Case relies, so far as the commission under the treaty of 1848 is concerned, is nothing more than the record of a rambling conversation between Mr. Gray, the Surveyor on the part of the United States who had just joined the commission, and General Conde, the Mexican Commissioner, with regard to the proposed survey of the Gila River. The minutes of the commission of December 4, 1850 ^e show that the commission had discussed the difference between "decisions and agreements" and general

^a Mexican Countercase, pp. 36-38.

^b U. S. Case Appendix, p. 545.

^c See *supra*, p. 35.

^d Mexican Case Appendix Annex 12, p. XLVI.

^e Mexican Case Appendix Annex 12, p. XX.

minutes "of their proceedings" and although General Conde's very sensible suggestion that only the "decisions and agreements" should be entered in the journals was not adhered to the commission did ordinarily put the "decisions and agreements" into the shape of formal resolves,^a which was not done in this case, as indeed there was no necessity for so doing, since the conversation had no reference to any practical or specific proposition then pending before the Commission.

Finally, even if the commissioners had had authority to construe the treaty as regards the point in question and had endeavored in formal manner to do so it seems very doubtful whether they would have reached the conclusion now contended for by the Government of Mexico. Although both Mr. Gray and General Conde use general expressions which, standing alone, would support the present Mexican contention, it is a most significant fact that when it came to making definite by illustration what was really in the minds of the speakers, "General Conde drew on a piece of paper the river Gila near the town of ———, situated on its left margin. After that he changed the course of the river, giving it an upward direction, and in this manner segregated the town, or, in other words, passing it over to the right margin. And he remarked that when the line was traced and marked, the town (figure) was in Mexico, and on the left edge of the river, and that now although it was on the right edge of the river, it still remained in Mexico, and the river at that place ran totally in Mexico."^b

The case stated is a case of avulsion, pure and simple. The result reached by General Conde would have been reached by Attorney General Cushing and it is submitted that there is little more reason for quoting the minutes of the meeting at Santa Rita del Cobra in favor of the present Mexican contention than in support of his views.

^a As to the practice of the Commission see Joint Journal of December 3, 1850, Mexican Case Appendix Annex 12, XV., Journal of December 4, 1850, XX; December 14, 1850 XXIV at XXV; December 20, 1850, XXV at XXX; December 25, 1850; XXX at XXXII and XXXIII; February 17, 1851, XXXV, etc., etc.

^b Mexican Case Appendix Annex 12, XLVIII. It is interesting to note that Mr. Gray in his letter to Mr. Stuart of August 11, 1851, in which he discussed this same question also illustrated his meaning by two cases of avulsion, one a hypothetical case of Brownsville, Texas, being transferred to the Mexican side and the other the case of the Island of San Elizario which had been transferred to the American side on the river by an avulsion some few years before the date of Mr. Gray's letter and which was subsequently transferred to the Mexican side by another avulsion. (Mr. Gray to Mr. Stuart, U. S. Countercase Appendix, p. 208 at 211 and 212.)

The Mexican Case also endeavors to vouch the commission under the Gadsden Treaty of 1853 to warrant the soundness of the present Mexican contention,^a relying for that purpose upon the minutes of the commission of June 25, 1856.^b It has already been shown that the Boundary Commission under the treaty of 1853 had no authority to mark or establish the line along the Rio Grande and particularly that portion of the line now in dispute.^c Any expression of opinion which they might have inserted in their journal therefore with respect to the effect of subsequent changes in the course of the river would have been *ultra vires* for this reason, as well as for the reason already given in connection with the commission of 1848, but it is submitted with all deference that the learned Mexican Agent is absolutely mistaken in thinking that they made any such expression. The journal of June 25, 1856, relied on in the Mexican Case clearly has reference to the land line only as is shown by the first paragraph, immediately preceding the paragraph relied on in the Mexican case, which shows that the latter paragraph was occasioned by the destruction of monuments which had been set up along the land line. If any further demonstration were needed that this journal had no reference to the changes in the water boundary it is found in the brief passage which gives the substance of a report which the commissioners under the treaty of 1853 proposed to make upon this very subject. This passage reads as follows:

"A considerable portion of the boundary is formed by the Rio Bravo, or Rio Grande; and in the settled portion of the valleys, which are best adapted to agriculture the bed of the river sometimes changes, and transfers considerable portions of land from one side to the other.—The Commissioners concluded and it is thought with correctness, that the boundary would remain, where the river fixed it at the time of the survey, and as shown in the maps.—A case of this kind is threatened in the valley of El Paso, and anxious inquiries have been made on the subject. The parties making the inquiry, have been referred to the printed maps, and informed that any change in the river, detaching solid masses of land, does not change the jurisdiction." ^d

This is, as Attorney General Cushing pointed out in his opinion subsequently rendered, "in substance correct," i. e. it says that an avulsive change works no alteration in the boundary line. Is

^a Mexican Case p. 36.

^b Mexican Case p. 37.

^c U. S. Countercase, pp 9-11.

^d U. S. Case Appendix, pp. 1129 and 1130.

it reasonable to suppose that if the journal of June 25, 1856, had dealt with changes along the water boundary and had decided that a river boundary is a fixed and invariable line, as the Mexican Case contends, it would have been necessary to adopt a further report in November of the same year to the effect that avulsive changes do not alter the boundary line? Moreover, the construction which the Mexican Case places upon the journal of June 25, 1856, is not only entirely inconsistent with the proposed report but is absolutely contrary to Major Emory's views which he had placed on record in his letter to the Secretary of the Interior on April 2d, 1849, where he said, with reference to the Gila which formed part of the fluvial boundary under the treaty of 1848, "The Gila does not always run in the same bed; whenever it changes the boundary must change, and no survey nor anything else can keep it from changing. A survey of that river, therefore, as it fixes nothing, determines nothing, is of minor importance. It forms of itself a more apparent and enduring monument of the boundary than any that can be made by art."^a

However, acts speak louder than words and the acts of the commissioners and surveyors under the convention of Guadalupe Hidalgo appear to show conclusively that they were not in practice disciples of the fixed line theory, now propounded by the Mexican Government. The actual work of surveying the Rio Grande River was done by Messrs Emory and Salazar as surveyors under the commission of 1848. Later these gentlemen became themselves commissioners under the treaty of 1853. The instructions which Señor Salazar gave to his engineer, don Augustin Diaz, show clearly that Señor Diaz was not expected to survey a fixed boundary line but a river valley.^b If the commissioners and surveyors under the treaty of 1848 had understood that they were laying down a "fixed and invariable" line along the Rio Grande they would at least have taken steps to lay down a precise and definite line and not merely have surveyed a river valley, but the facts are quite the contrary. An examination of the boundary maps along the Rio Grande fails to disclose any definite and fixed boundary line, the maps simply show the river and its bed. The only exception to this is in the case of islands where a small dotted line is frequently used to show on which side of an

^a U. S. Case Appendix, p. 1063 at 1065. See Mr. Gray to Mr. Stuart, August 11, 1851, U. S. Countercase, Appendix 208 at 210 and 211 as to Major Emory's views with reference to the fixed line theory.

^b Mexican Case Appendix Annex No. 3, pp. III, IV, V, VI, et seq.

island the main channel was located at the time of the survey. Not only do these surveys and maps fail to show any definite line but the two surveys do not even agree in a considerable part of the line as to the bed of the river. This was the case between El Paso and Juarez^a and lower down at San Elizario^b and the commissioners were not only aware of these differences but placed on record in their journals their view that these differences "in no way affect the boundary line."^c

THE OPINION OF ATTORNEY GENERAL CUSHING.

The great land-mark of interpretation of the treaties of 1848 and 1853 is the opinion of Attorney General Caleb Cushing, rendered to the Secretary of the Interior November 11, 1856. The Mexican Case endeavors to break the force of this opinion by the suggestion that it was either the result of ignorance or conscious perversion of the terms of the treaties involved.^d

The opinion of Attorney General^e Cushing, rendered to the Secretary of State on October 29, 1855, regarding the payment of the consideration due Mexico under the treaty of 1853, would seem to acquit Mr. Cushing of the charge of ignorance of the provisions of that treaty, thus leaving open only the second alternative presented in the Mexican Case, namely, that "he knowingly mutilated the text of the treaty," or the further suggestion, which is now respectfully submitted as more reasonable as well as more charitable, that he saw nothing in the various provisions upon which the Government of Mexico now relies which required special mention. The Mexican Case also taxes Mr. Cushing with not taking into account the minutes of the boundary commission^f and the Mexican Countercase takes some pride in pointing out that the supposition of the case in this respect is

^a U. S. Case portfolio map No. 6.

^b U. S. Countercase p. 18. See also Proceedings International Boundary Commission, U. S. Case, Appendix, p. 109, etc.

^c See U. S. Countercase p. 19, citing Joint Journal of Commissioners Emory and Salazar, September 21, 1857; U. S. Countercase Appendix p. 62. Compare with the action of the commissioners as regards the water boundary as recorded in this journal and the treatment of a similar matter along the land boundary as shown in the Journal of June 24, 1856, U. S. Countercase p. 59 at 60. See also Report of the International Boundary Commission United States and Mexico, 1891-1896, p. 53, 208.

^d "That in opposition to the interpretation given by the Boundary Commissioners, that emitted by the Attorney-General of the United States of America, Mr. Caleb Cushing, cannot prevail, because when giving his opinion he neither had before him all the documents which established the dividing line, or else he knowingly mutilated the text of the treaty, nor was the text of the declaration of the Boundary Commissioners modified, in the sense by him indicated." (Mexican Case, p. 52.)

See also Mexican Case pp. 38-42.

^e See U. S. Countercase, Appendix, p. 203.

^f Mexican case p. 42.

borne out by the records of the Department of Justice published in the Appendix to the Case of the United States.^a

The records at the Department of Justice certainly fail to show affirmatively that the minutes of the boundary commission were before Mr. Cushing, although the opinion was rendered less than five months after the joint journal of June 25th, 1856 and while Major Emory and Señor Salazar were still in Washington and the International Boundary Commission was still holding sessions. That they are not affirmatively shown to have been before him and that in any event they are not referred to by him, so far from discrediting his opinion, is most persuasive that the minutes in question were and are unimportant and irrelevant.^b

It is submitted that Attorney General Cushing's opinion stands unshaken as the law in this case.

THE CONSTRUCTION PLACED UPON THE TREATIES OF 1848 AND 1853 BY THE TWO GOVERNMENTS IN DIPLOMATIC CORRESPONDENCE.

The Case of the United States makes the following statements which, it is believed, are fully sustained by the record:

"It is maintained that the views set forth by Attorney General Cushing in his opinion, above referred to, rendered within three years of the date of the signature of the treaty of 1853, have been consistently adhered to by the United States from that day to this."^c

"It is submitted with deference that the record of the diplomatic correspondence shows that during the earlier portion of the period from 1853 to 1884, the Government of Mexico apparently shared the views of the United States."^d

While no record has been found in the Department of State showing that Attorney General Cushing's opinion was transmitted to the Government of Mexico the circumstances under which it

^a Mexican Countercase, p. 38.

See also Mexican Case pp. 39 and 40.

^b The Mexican Case (p. 38, 42) is also in error in its statement that the Joint Journal of the International Boundary Commission of June 25, 1856 was the "proposed report of the Commissioners" which formed the subject of Attorney General Cushing's opinion. (See Mr. Fowler to Mr. Knox, U. S. Case Appendix p. 1128 at 1129.) (See Mexican Countercase pp. 38, 40.)

^c Case of the U. S. p. 36.

^d Case of the U. S. pp. 36 and 37.

was rendered, namely, with reference to a proposed report of the Commissioners Emory and Salazar, then sitting in Washington, seem to render it reasonable to suppose that a copy of the opinion was furnished Señor Salazar and probably was transmitted by him to the archives of the Mexican Government. Be that as it may, an occasion very soon arose which brought about the formal communication of Attorney General Cushing's opinion by the United States Government to the Government of Mexico.

THE SEWARD-ROMERO CORRESPONDENCE OF 1867.

Under date of January 9, 1867, Señor Romero, for many years Mexican Minister at Washington, wrote a note to the Department of State communicating a copy of the instructions which he had received from the Mexican Minister of Foreign Affairs, together with a letter of the Governor of Chihuahua to the Minister of Foreign Affairs, which in turn incorporates a communication from the Jefe Politico and Military Commander of the District of Brazos to the Governor of Chihuahua. This correspondence all related to the encroachments of the Rio Grande upon Mexican territory between El Paso and Juarez; in other words, the correspondence related to the formation of the Chamizal Tract. A detailed discussion of this correspondence, which is printed in full in the Appendix to the Case of the United States,^a will be reserved for the oral argument.

It is submitted that while the Jefe Politico of the District of the Brazos, a subordinate officer, in a communication to his superior, the Governor of Chihuahua, does use some language which might be interpreted as asserting the fixed boundary theory as now set up by the Mexican Government, the instructions of the Mexican Minister of Foreign Affairs to Minister Romero show that this theory was not adopted by the Mexican Foreign Office.^b On the contrary the instructions of the Secretary of Foreign Affairs to Señor Romero appear to assume the ordinary doctrine of avulsion and accretion. That this was Señor Romero's understanding of his instructions is shown by the cordial way in which he acknowledged Mr. Seward's reply, which had transmitted Attorney General Cushing's opinion as setting forth the views of the Government of the United States. Señor Romero's note shows clearly that he was under the impression that the Mexican contention rested on an avulsive change at El

^a U. S. Case Appendix p. 562-567.

^b U. S. Case Appendix p. 555.

Paso similar to the change lower down at the Island of San Elizario and he welcomes Attorney General Cushing's opinion as a correct exposition of the principles which should be applied equally to both cases. Señor Romero says in part:^a

"I have read that opinion with interest, and it has appeared to me that the principles enunciated therein are equitable and founded on the teachings of the most accredited expositors of international law. On this date I transmit to my government a copy thereof, and of your note which accompanies it.

"In the opinion spoken of, the proper distinction is taken between the case of change of the stream of a river which serves as boundary between two states, whether gradual or by alluvion, without change in its general direction, and that in which such change occasioned by the force of the river be sudden and complete, and cause a change of current. In the first case it is considered that the actual reach of the river continues to form the divisional line, and that the land gained or lost on each bank is acquired or lost by the state to which the bank belongs which undergoes such changes; and in the second case, that the divisional line cannot follow the new stream, but continues along the abandoned one which the river followed before the violent mutation.

"It pertains to the government of Mexico to express its conformity to or dissent from these principles. Until I receive its instructions on this point, which I will duly communicate to you, I hesitate not to adopt them, meanwhile, as reasonable and equitable."

Señor Romero transmitted Attorney General Cushing's opinion and his own reply to Secretary Seward to the Mexican Minister of Foreign Affairs. The Mexican Foreign Office was therefore advised not only that Señor Romero had expressed his acquiescence in Cushing's opinion but that he had requested that the opinion be sent to the United States authorities on the Rio Grande for their guidance in the future. Under these circumstances it is hardly conceivable that the Mexican Foreign Office should have failed to make known its dissent from Attorney General Cushing's opinion if that opinion did not meet the approval of the Mexican Government.

It is submitted that the Romero-Seward correspondence of 1867 shows that Attorney General Cushing's opinion was at that time asserted by the United States to be the correct interpretation of the boundary treaties with the acquiescence of the Government of Mexico.

^a Señor Romero to Mr. Seward February 6, 1867, U. S. Case Appendix p. 565 at 566.

THE PALACIO-FISH CORRESPONDENCE OF 1871-1872.

No record has been found of any continuation of the correspondence of 1867, but a note of Señor Palacio, the Mexican Chargé d'Affaires at Washington, dated August 11, 1871, dealing with the construction of certain dikes near Brownsville, gave occasion for a further expression of the views of the Mexican Government, entirely in accord with Attorney General Cushing's interpretation of the boundary treaties.

After pointing out the threatened inundation of Mexican territory as a result of the construction of dikes upon the American side near Brownsville Señor Palacio continues:^a

"This, however, is not the greatest damage which a change in the course of the river may produce; it may alter the dividing line between the territory of Mexico and that of the United States which has been established in conformity to treaties. The invasion of the Mexican territory by the waters of the river, proceeding from the cause set forth, has been slowly and gradually increasing from day to day; and under these circumstances when any portion of the ground which now is on the right bank passes to the left, the Government of the United States might claim with apparent reason that said ground had become its property. It might be replied with truth that the change was not the effect of natural causes, but obtained artificially and without right; but there is no doubt that it might stir up a question necessarily disagreeable. If such a result can now be avoided, it seems most appropriate to adopt measures for doing so, and that is the object of the present note."

It will be observed that in this passage Señor Palacio clearly assumes that a slow and gradual change in the course of the river wrought by natural causes would alter the boundary line. After further exchanges between the Department of State and Señor Palacio the correspondence was closed by Secretary Fish's note of March 2, 1872, and Señor Palacio's response of March 11, 1872. Secretary Fish, by way of answer to Señor Palacio's complaint, transmitted a copy of a report from the United States Consul at Matamoros in which the Consul reviews the correspondence of 1867, pointing out Señor Romero's acceptance of Cushing's opinion. In Señor Palacio's note of acknowledgment he says that he has "thought proper to give an account of your [Mr. Fish's] note aforesaid, and of its enclosure to the Government of

^a U. S. Case Appendix pp. 569-570.

Mexico, to the end that, in view of the statements made in the latter, it may give me orders as to what I am to do in the matter." ^a

No further correspondence in regard to this matter has been found. For the second time the question of the effect of changes in the course of the Rio Grande had been mooted between the two governments; for the second time the United States had specifically brought Attorney General Cushing's opinion to the attention of the Mexican Legation; for the second time the views expressed by the Legation were entirely in harmony with Cushing's opinion; and for the second time the Mexican Legation had reported the entire correspondence to the Mexican Foreign Office without eliciting any expression of dissent from the Government of Mexico. Twenty-five years had passed since the signature of the Treaty of 1848 and twenty years had passed since the signature of the Treaty of 1853 and Attorney General Cushing's opinion still stood unchallenged as a correct interpretation of the boundary treaties. Under these circumstances it is submitted that the statement in the Case of the United States to the effect that "the record of the diplomatic correspondence shows that during the earlier portion of the period from 1853 to 1884 the Government of Mexico apparently shared the views of the United States" ^b with respect to the proper interpretation of the boundary treaties is amply sustained.

THE CORRESPONDENCE BETWEEN VARIOUS OFFICIALS OF THE MEXICAN GOVERNMENT PRINTED IN THE APPENDIX TO THE MEXICAN CASE, ANNEX NO. IO.

It was pointed out in the Countercase of the United States that the correspondence relied on by the Mexican Government to show the presentation of a claim on account of the Chamizal Tract to the Government of the United States in 1874 consisted entirely of internal correspondence between various Mexican officials which could only acquire significance as regards the United States "through communication, either textually or in substance, to the Department of State through the accredited Mexican representative at Washington." ^c It was furthermore stated that a careful examination of the pertinent files of the Department of State had failed to show any communication from the Mexican Legation

^a Señor Palacio to Mr. Fish, March 11, 1872, U. S. Case Appendix p. 577.

^b See *supra* p. 38.

See Case of the United States pp. 36 and 37.

^c U. S. Countercase p. 26.

upon the matter in question on either the 17th of November or the 17th of December, 1874, the dates given in the English and Spanish versions of the Mexican Case respectively, or any record, or any acknowledgment of or any reference to such communication. In accordance with the arrangement effected between the Agents of the two countries for the reciprocal inspection of documents printed or relied on in the Cases or Countercases the Agent of the United States duly requested the privilege of inspecting and taking a certified copy of the communication of the Mexican Legation in Washington to the Department of State of the United States of the 17th of November or December, 1874, referred to and relied upon in the Mexican Case.^a Through the courtesy of the Mexican Foreign Office and the Mexican Embassy a certified copy of the following communication from the Mexican Minister at Washington to the Mexican Secretary of Foreign Affairs was furnished in response to this request:

[Translation.]

"Interview with Mr. Fish. Boundaries in the Rio Grande.

"No. 148.

"WASHINGTON, Dec. 17, 1874.

"Today, Thursday, I went to see the Secretary of State and spoke to him of the instructions which I had received in your note No. 161 of September 12 last, to begin a negotiation for the purpose of fixing the boundaries of both nations according to the spirit of the treaty of La Mesilla, at the part where they have been divided by the Rio Grande, in view of the violent alterations which the latter has in its course. I explained to Mr. Fish what was taking place opposite Paso del Norte and was communicated to me in the annexes to the aforementioned note, as well as the means proposed by that Ministry to obviate the difficulties. He answered me that he would see our treaties with the United States and look up the matter when I should send to him the note on the subject which I had announced to him. I will do this within a few days, it having been my object in this conversation to merely examine the disposition of Mr. Fish on the matter, which did not seem unfavorable to me.

"I reiterate, etc.

"The MINISTER OF FOREIGN AFFAIRS,

"Mexico.

"(SEAL)

"Copy.

"CARLOS PEREYRA,

"First Secretary."

^a See correspondence relating to the inspection of documents printed or relied on in the Mexican Case and Countercase, U. S. Countercase Appendix, p. 3-7.

It thus appears that the Mexican Minister had only oral communication with the Secretary of State on December 17, 1874. There is no record of this interview to be found in the files of the Department of State and the Mexican Minister in his communication to his government, which has just been quoted and which appears to be the only record of this interview, merely says that he "explained to Mr. Fish what was taking place opposite Paso del Norte and was communicated to me in the annexes to the aforementioned note, as well as the means proposed by that ministry to obviate the difficulties." It is upon the basis of this meagre statement that the Mexican Case seeks to tax the Government of the United States with knowledge of the various communications of subordinate Mexican officials enclosed in the note of the Mexican Minister of Foreign Affairs, from which the Mexican Case quotes at length.^a

It is submitted that as the record stands at present the note of the Mexican Minister of Foreign Affairs of 1874 and its enclosures has not been sufficiently brought home to the Government of the United States to affect this case in any way except as an interesting record of the unexpressed views of the Mexican Government at that time. Even taking it on this basis it is not believed to be worth while at this stage of the argument to analyze the confused statements of various subordinate and purely internal Mexican officials.

The note of the Mexican Minister of Foreign Affairs itself, after speaking of the difficulties "caused by the sudden changes in the course of the Bravo del Norte River," proceeds to say that the Mexican Government deems it desirable to "establish by means of a formal declaration the meaning which should be given the corresponding treaty with regard to boundaries." After quoting from the treaty the note adds:^b

"That it be acknowledged that the constant boundary is the river, be it where it may, and in the case of several branches, the deepest of them is the boundary: That the slow and successive increase of land does not constitute a change; but if the change be sudden, the part cut off remains under the jurisdiction of the country to which it belonged before, allowing that the river flowing in front of the said tract, be made use of according to the treaty, if such a part be navigable.

"Perhaps in support of this claim may serve the sense that should be given to the second paragraph of Article VII of the same treaty, which says: 'The stipulations contained in the

^a See Mexican Case, pp. 12-15.

^b Mexican Case Appendix, Annex 10, pp. iii and iv.

present article leave in all their integrity the territorial rights of both republics within the boundaries which have been established.'

"It should be borne in mind that when marking the boundary the points through which it should pass were fixed astronomically, which indicates the wish of both Nations that there never should be any increase of territory.

"It is clear that the boundaries which are definitely established when the treaty was celebrated, constituted mathematical lines to be thenceforth considered as invariable; and that no provision was made for the event not then foreseen, that the rivers, suddenly changing their course, should penetrate into either of the two territories, dismembering them in such a way as to render the boundaries indefinite and imaginary, with irreparable detriment to one of the two Nations, whose territorial rights would be at the mercy of an unexpected change in the currents of the river."

It will be observed that the Minister expressly says "that the slow and successive increase of land does not constitute a change; but if the change be sudden, the part cut off remains under the jurisdiction of the country to which it belonged before." True, in the last paragraph it speaks of "mathematical lines to be thenceforth considered as invariable," but it immediately adds "and that no provision was made for the event not then foreseen, that the rivers, suddenly changing their course, should penetrate into either of the two territories," showing clearly that the author of the note in drafting the last paragraph was thinking of cases of avulsion and was not intending to repudiate the expressed declaration of the first paragraph.

It is submitted that this passage, fairly construed as a whole, contains nothing inconsistent with Cushing's opinion.

It is submitted that it shows that the Mexican Minister of Foreign Affairs in 1874 was thinking in terms of avulsion. The fixed boundary theory had not as yet found a lodgment in the Mexican Foreign Office.

THE MEXICAN PROJECT OF 1875.

The Mexican Case states that "the result of the claim presented by the Government of the United States of Mexico to that of the United States of America in 1874 was the proposition which the Mexican legation at Washington made to the State Department on the 25th of March, 1875, when handing Assistant Secretary Cadwalader a rough memorandum of agreement to decide the disputes

which might arise in the rivers Grande or Bravo del Norte and Colorado." This is all that is disclosed by the record^a as to the exciting cause of the Mexican proposition for a new treaty of March 25, 1875; but in view of the similarity of the views which Minister Romero was instructed to "advance" in Señor Lafragua's note of September 12, 1874, with the views actually embodied in the Mexican propositions of March 25 and December 2, 1875, it seems entirely reasonable to suppose that the latter was drawn up with reference to the former. The Mexican proposition of March 25, 1875, reads as follows:

"Whereas, by virtue of article V of the Treaty of Guadalupe Hidalgo, some portions of the dividing line between the two countries are respectively marked by the Gila and Grande Rivers; to the end of avoiding the difficulties which may arise by the changes to which the aforesaid rivers—as many others—are liable at any time, this occurring specially with the Rio Grande; the high contracting parties have agreed as follows:

I.

"The dividing line shall forever be that as provided under the said Treaty, notwithstanding any alteration on the margins and even in the course of the rivers referred to, provided that the alteration be effected gradually and slowly by the natural action of alluvium.

II.

"Any other alterations in the course or on the margins of those rivers, shall not cause any change whatever in the dividing line astronomically determined by the Boundary Commissions of both Governments in 1852 and which runs along the center of the current of the rivers according to the course they had at the time of the survey.

III.

"Notwithstanding any of the alterations referred to in the preceding article, the right of navigation common to the two countries as provided under article VII of the aforementioned Treaty shall continue to be the same in the portions of the river that may result embraced within the territory of one of the two nations."^b

^a U. S. Countercase, pp. 26 and 28.

^b Mexican Countercase Annex 3A, p. xix. The archives of the Department of State show the project of March 25, 1875, to be identical with the subsequent project of December 2, 1875 (U. S. Countercase, p. 27), but this is probably due to a subsequent substitution at the request of Señor Romero of his second project for his first one in the files of the Department. The difference, in any event, is immaterial.

The Mexican project of December 2, 1875, is identical, with the insertion of the following article between articles 2 and 3 of the project of March 25, 1875, the new article becoming Article 3 of the new project:^a

"If, by the force of the current, a portion of territory of one of the two nations were severed from one of the margins and carried within the boundaries of the neighboring nation, the said portion shall continue to belong to the nation to which it formerly corresponded.

It is submitted that the Mexican proposition of 1875 merely amounts to a proposal to codify the general rules of international law with respect to accretion and avulsion in the case of arcinuous boundaries.

The new article was, as Señor Mariscal, the Mexican minister at Washington, himself says in his dispatch to the Mexican Foreign Office of December 2, 1875, "explanatory rather than additional."^b It was inserted in deference to an instruction of the Mexican Foreign Office of April 30, 1875, in which the Foreign Office acknowledge the note of Señor Romero of March 26, 1875, in which he forwarded to the Foreign Office a copy of his draft of March 25th. In this note Señor Lafragua, the Mexican Secretary of Foreign Affairs, while approving generally of Señor Mariscal's draft of March 25, said that he was instructed by the President to say that it would be of the "greatest importance to include * * * a paragraph in which the following two ideas are clearly and positively stated:

"1. That, if, owing to violent changes in the direction of the current, lands are detached from one of the two shores, the lands which for this reason are separated by the new current and remain on one or the other territory, shall be considered to belong respectively to the nation to which they belonged before being separated by the channel of the river.

"2. That in case there are two or more currents, following the same direction to the mouth, and one of these currents should become deeper while the one which served as a boundary line ceases to be the deeper, the rule followed shall be to consider as belonging to the respective nation the bars or lands which belonged to it before the present channels became deeper owing to the violent change of the currents."^c

^a Mexican Counter case, Annex IIIA, p. xxi.

^b Mexican Counter case, Appendix Annex 3C, p. xxii.

^c Señor Lafragua to Señor Mariscal, Apr. 30, 1875. Correspondence relating to the inspection of documents printed or relied on in the archives of the Mexican Embassy at Washington, p. 14. A certified copy of this note to which Señor Mariscal's dispatch of Dec. 2, 1875 (Mexican Counter case, Annex No. 3C, xxi), is a

Minister Mariscal, in his note of December 2, 1875,^a explains his reasons for thinking it unnecessary to insert the second idea set forth in the instruction of the Mexican Minister of Foreign Affairs. Although he uses certain expressions which, taken alone, might seem to indicate that he held the fixed-boundary theory, he afterwards makes it clear that what he means is that this line, which he terms "mathematical," can not be altered by any change except "that produced by alluvium," thus showing that he too was thinking in terms of avulsion and not in terms of the fixed-line theory. It is furthermore to be remembered that this letter of Señor Mariscal's to the Mexican Minister of Foreign Affairs is now known to the United States for the first time and that his view with respect to leaving out the second idea set forth in Señor Lafragua's note, namely, the provision with respect to the shifting of the main channel of the river through the deepening of one branch, did not prevail, but that on the contrary the idea appears in the second article of the treaty of 1884, negotiated by Señor Romero and Mr. Frelinghuysen, while Señor Mariscal was Secretary of Foreign Affairs for Mexico. It is submitted therefore that the Mexican project of 1875, even when construed in the light of the undisclosed intentions of the Mexican negotiator, does not show that the Government of Mexico at that time had espoused the fixed-boundary theory.

MORTERITOS ISLAND.

The Mexican note of January 15, 1910, the Mexican Case, and the Mexican Countercase all lay great stress upon the correspondence relating to the island of Morteritos as showing the abandonment by the United States of the views set forth in Attorney General Cushing's opinion and the acceptance of the fixed boundary theory. Says the Mexican note of January 15: "The case of the island of Morteritos, otherwise Castor Island, gave occasion for an exchange of notes between the two Governments which leaves no room for doubt."^b Says the Mexican Case:

reply was furnished the Agent of the United States through the courtesy of the Mexican Embassy at Washington under the terms of the agreement for the reciprocal inspection of documents. The Agent of the United States did not feel at liberty under this agreement to call for Señor Mariscal's dispatch of Mar. 26, 1875, referred to in this instruction, which would doubtless throw further light upon the meaning of the draft submitted by him to the Department of State on that date.

^a Mexican Countercase, Appendix, Annex 3C, xxi, xxii, and xxiii, cited and relied on Mexican Countercase, pp. 24 and 25.

^b Señor de la Barra to Mr. Knox, January 15, 1910, U. S. Case Appendix, p. 409.

"But it was the Government itself of the United States of America, through its State Department, that undertook to establish the true interpretation which should be given to the stipulations of the Boundary treaties of 1848 and 1853, openly and resolutely opposing the opinion of the distinguished Jurisconsult and Attorney-General of the Republic, Mr. Caleb Cushing.

"The celebrated case known by the name of 'Island of Morteritos Case,' * * * was the one which served as the occasion for the Government of the United States of America to make known to that of the United Mexican States, the interpretation of the text of our boundary treaties.

* * * * *

"As the foregoing 'Morteritos' case indicates, in conformity with the opinions sustained by both State Governments, the Government of Mexico and that of the United States of America were agreed on that, according to the principles of the Boundary treaties of February the 2nd, 1848 and December 30th, 1853, it was not possible to admit the right of any one of the two countries to annex territory of the other, whether such annexation were effected through accession, that is, through alluvion, or through a change in the bed of the river.

"The theory sustained, in consequence, by Mr. Caleb Cushing, that the boundary treaties should be interpreted according to the principles of the old Roman legislation, invoked by the Law of the Nations, was completely and definitely destroyed." ^a

And in the Mexican Countercase it is stated that ^b—

"The Agent of the Government of the United States affirms that the case of the Island of Morteritos furnishes no exception whatever to the interpretation of Mr. Caleb Cushing and that, in consequence, the Government of the United States of America has never admitted that the dividing line were fixed and invariable.

"We, in the course of the demand of the Mexican Government, presented on the 15 of February ultimo, have proved totally the contrary and have demonstrated that the so-called 'Island of Morteritos' or 'Beaver Island' case, proves that the Secretary of State, Mr. Frederic T. Frelinghuysen, did not accept the doctrine of Mr. Caleb Cushing and that he stated that he could not lay down the principle that the Mexican Government could appropriate to itself territory of the United States, by reason of alluvium or of changes in the bed of the river, which is precisely what constitutes the fundamental groundwork of Mr. Caleb Cushing's theory."

On the contrary, the United States stated in its Case and is prepared to maintain that "the views set forth by Attorney General Cushing in his opinion above referred to, rendered within three years of the date of the signature of the treaty of 1853, have been

^a Mexican Case, pp. 45-48.

^b Mexican Countercase, p. 40.

consistently adhered to by the United States from that day to this, and it is respectfully submitted that the correspondence with regard to the island of Morteritos, from which brief extracts are given in the Mexican note, will be found, upon examination in its entirety, to furnish no exception to this consistent course.^a

The issue upon this point seems clearly drawn and inasmuch as Mexico has placed such stress upon this proposition the United States will, with the permission of the tribunal, examine and discuss in detail in the oral argument the voluminous correspondence dealing with this case, all of which, so far as it is known to the United States, has been printed in the Appendix to the Case of the United States, pages 581 to 671.

In view of the intention of the United States to go into this matter fully on the oral argument, the matter will be somewhat summarily dealt with here.

The admitted facts of the Morteritos Island Case, as developed in the correspondence,^b were as follows:

In 1880 the island was south of the main channel of the Rio Grande. In 1884, when the discussion as regards the title to the island took place, it was not only north of the main channel, but had become attached to the American side. It was at first a matter of difference between the two Governments as to whether in 1852, at the time of the Emory and Salazar survey, the island was north or south of the main channel. This dispute was settled in favor of the United States beyond the possibility of a doubt by the records of the International Boundary Commission, which showed that in 1852 the main channel of the river ran south of the island. Under such circumstances the title of the United States, under the general principles of international law as expounded in Cushing's opinion, is unquestionable, and to this effect are the authorities from Justinian to a recent decision of the Supreme Court of the United States.^c There is, therefore, nothing in the action of the United States in claiming title to the island or in that of the Government of Mexico in admitting the

^a U. S. Case, p. 36.

^b See U. S. Case Appendix, pp. 582, 583, 585, 623, 626-630, etc.

^c See Moyle's Institutes of Justinian, 4th ed., pp. 38 and 39.

Rayneval, Institutions de Droit de la Nature, p. 24.

Creasy, First Platform of International Law, pp. 223-243.

De Martens, Traité de Droit International, sec. 39.

Holtzendorf, p. 267.

Missouri v. Kentucky (Wolf Island Case), 11 Wall., 395-411, citing. Heffter, Droit International, p. 143, sec. 6. Caratheodery du Droit International, p. 62.

correctness of the position of American Secretary of State which is inconsistent with the traditional views of the United States.

The following passage is quoted from the Mexican Case:^a

"The declarations which State Secretary Frelinghuysen made when discussing the 'Morteritos' case, indicate that the Government of the United States recognized as fixed and invariable the line of the river, such as it was marked by virtue of the treaties of 1848 and 1853, and that it denied the Government of Mexico all rights to acquire American territory whether through accession or through changes in the bed of the river.

"Thus Mr. Frelinghuysen in the Note which he addressed Señor Romero, dated July the 10th, 1884, said: 'This position is, moreover, wholly opposed to the contention of the Mexican Government itself, that the territorial jurisdiction established on behalf of the respective parties to the Treaty of Guadalupe Hidalgo remain forever as originally fixed under that compact, and are not to be affected by any abrupt changes in the course of the river Bravo.

"This reduces the question to one of simple fact, namely, the ascertainment of the boundary channel fixed by the Commissioners under the Treaty of Guadalupe Hidalgo.

"To the end of ascertaining that fact, an examination of the original records and charts of the Commissioner of Survey has been made by Brig. Gen. W. H. Emory, of the U. S. Army, under whose supervision, as Commissioner on the part of the United States, the original survey and determination of the boundary was effected.'

"And towards the close of his Note, he said:

"In conclusion, I have the honor to inform you, in answer to several notes, that the facts and record of the case warrant and your demand that the Government of the United States shall regard its territorial jurisdiction over the Island of Morteritos, otherwise 'Beaver Island,' (No. 13), as established by the Boundary Commission under the Treaty of Guadalupe Hidalgo, and, consequently, that the Mexican pretension to that island and to accretions thereto from the left or United States bank of the Rio Grande shall be denied.'" (Wharton, Op. cit. Vol. 1, pp. 88 and 89)."

Is it not true that the Mexican project of 1875 and the other communications of the Mexican Government go to the proposition that "territorial jurisdiction" is "not to be affected by any *abrupt*^b changes in the course of the river Bravo"? Is it not true that the Mexican position as regards the Island of Morteritos was inconsistent with this contention and with the general principles of international law with respect to avulsive changes? How does Secretary Frelinghuysen, in pointing out this inconsistency on the part of the Government of Mexico, abandon the views of Attorney General Cushing? It is true that if this sentence were

^a Mexican Case, p. 46.

^b Italics ours.

intended to be a full exposition of Secretary Frelinghuysen's own views instead of an argumentum ad hominem with respect to the position of the Mexican Government in this particular case, it might perhaps be criticized on the ground that it does not go on to say that the boundary line may be affected by gradual changes in the river, but it is unnecessary to suggest that Secretary Frelinghuysen was not attempting to give a full exposition of his views; he was simply neatly turning a point in argument with respect to the inconsistency of the Mexican Government as to the effect of a change through the deepening of a river channel, a change assimilated in its effects in international law to an avulsion.

The Mexican Case proceeds as follows:^a

"The aforementioned Secretary of State, Mr. Frelinghuysen, said to Mr. Morgan, then Minister of the United States in Mexico, under date of July the 11th, of the following year: '* * * the Mexican claim is completely at variance with the ground taken by the Mexican Government itself, that the boundary fixed by the survey is definite and not to be changed. You may avert to the proposal made to this Government by Mr. Romero (in a note dated 31st May), to review the negotiation proposed in 1875 by Señor Mariscal to Mr. Fish for a convention to settle boundary disputes growing out of changes in the channel of the Bravo by declaring that no such change shall affect the actual boundary fixed by the survey, and you may observe that this Government can hardly be expected to attach much weight to that proposition if, in the first case of dispute arising, the Mexican Government is found to adopt a diametrically opposed theory. You may also find it convenient to avert to the circumstance, shown by the inclosures to my No. 520, that the Mexican owners claim the subsequent accretions to Morteritos as belonging to them, and, consequently, to the territorial jurisdiction of Mexico also, and comment on its untenable character; for even if Morteritos Island were Mexican territory, which the record of the survey shows it is not, the annexation of United States territory by accretion or by change of channel could not be recognized.'" (Wharton loc. cit.)

In the note from which this quotation is made, Secretary Frelinghuysen, after briefly referring to the facts in the case, instructs the American Minister to seek an interview with the Mexican Minister of Foreign Affairs and then proceeds as follows, commencing at the beginning of the sentence, which is in part quoted in the Mexican Case:

"You will point out to him that under whichever aspect it be viewed, whether as resting on a change in the deepest channel

^a Mexican Case, pp. 46 and 47.

subsequent to the assignment of the Survey, or on the allegiance of the reputed Mexican owners of the land and on any agreement among them of which the Mexican courts may have taken cognizance, the Mexican claim is completely at variance with the ground taken by the Mexican Government itself, that the boundary fixed by the survey is definitive, and not to be changed.”^a

The remainder of the quotation as given in the Mexican Case then follows.

Here again Secretary Frelinghuysen simply says that the Mexican contention, whether “resting on a change in the deepest channel” or “on the allegiance of the reputed Mexican owners” or “on any agreement among them,” is “at variance with the ground taken by the Mexican Government itself, that the boundary fixed by the survey is definitive and not to be changed.” It is submitted that even if these latter words were taken, divorced from their context, in their fullest scope, so that they attributed to the Mexican Government of that time the fixed line theory as it is held to-day, it would not tend in the slightest degree to the proposition that the United States accepted that theory. But when Mr. Frelinghuysen’s language is examined in its entirety, in view of his prior reference to “a change in the deepest channel” (which as above stated is equivalent to an avulsion) and the Mexican project of 1875, which is apparently the statement of the Mexican position to which he has in mind, it seems clear that Mr. Frelinghuysen was not really attributing to the Mexican Government the present fixed line theory at all. He was simply referring to the same Mexican contention of which he had spoken the day before in his letter written to Señor Romero, namely, that the boundary should not be “affected by any abrupt change in the course of the Rio Bravo,” which was, as we have seen, the proposition of 1875. It is surely not reasonable to suppose that Secretary Frelinghuysen had changed his mind with respect to the Mexican contention which he was combating between the 10th and 11th of July.^b

In any event it is submitted that, however Secretary Frelinghuysen understood the Mexican contention and whatever may have been the Mexican contention, his argument that the Mexican position on the Morteritos case was inconsistent with that contention has no tendency to show that the United States had abandoned the views of Attorney General Cushing.

^a U. S. Case Appendix, p. 657.

^b The Mexican Case is in error in stating that this letter to Minister Mariscal was written “under date of July 11th of the following year.”

In his Countercase the Mexican Agent places special stress upon the latter part of the passage from Secretary Frelinghuysen's note to Minister Mariscal, above quoted. This passage reads as follows:^a

"You may also find it convenient to advert to the circumstance, shown by the enclosures to my No. 550, that the Mexican owners claim the subsequent accretions to Morteritos as belonging to them and, consequently, to the territorial jurisdiction of Mexico also, and comment on its untenable character, for, even if Morteritos Island were Mexican territory, which the record of the Survey shows it is not, the annexation of U. S. territory by accretion or by change of channel could not be recognized."

When the facts of the case are remembered,^b this position becomes perfectly clear. The island of Morteritos had become attached to the mainland, and the Mexican owners of the island were claiming not only the island itself but the low grounds between the island and the bluffs on the American shore formed by accretion to the mainland. It is with reference to this claim, the claim to add to the island the accretions to the mainland of the United States, that Secretary Frelinghuysen said the claim to "annexation of United States territory by accretion" was "untenable."

To wrest this expression from its context and to attempt to make Mr. Frelinghuysen say that the boundary line along the Rio Grande could not be altered by accretion is, it is submitted, a palpable perversion of his meaning.

Finally, the Mexican Case relies upon Señor Romero's note of October 9, 1884, in which the Mexican Government relinquished its claim to Morteritos Island. The passage quoted in the Mexican Case is as follows:

"The bases of this decision rest upon the stipulations of the 5th Article of the Treaty of Guadalupe-Hidalgo of February 2, 1848, that the dividing line between our two countries from the Gulf of Mexico to Paso del Norte should be the centre of the Rio Grande, and that where this river had more than one channel the line should follow the deepest. This circumstance being borne in mind by the Boundary Commission in laying down the line the channel which lay to the south of Island No. 13, or Morteritos, or Beaver Island, left this island upon the side of the United States.

"As this is the basis presented by the Government of the United States to defend its rights to that island it thus recognizes that the limit between the two Republics are those fixed by the Treaty of Guadalupe-Hidalgo such as were laid down by the mixed com-

^a U. S. Case Appendix, p. 657.

^b See *supra*, p. 50.

mission without having been altered by the changes occasioned by the current of the river whether in its margins or the deepest of its channels." ^a

This language on its face and unexplained might be thought to amount to an assertion of the fixed-line theory, and it is submitted that this is the first expression which has been met with in the record up to this point which even *prima facie* can be deemed to be an assertion of that theory. If it be deemed that this interpretation is correct and that Señor Romero intended in this note to lay down the theory now contended for by the Mexican Government, it is submitted that this could in no wise bind the United States. The title of the United States to Morteritos Island, as has been stated, was absolutely clear on any theory, and the Secretary of State was in no wise called upon to enter into a post-mortem discussion of the theory upon which the Mexican Government saw fit to yield its contention, especially in view of the fact that negotiations for a new treaty were at once to be begun. Secretary Frelinghuysen's simple acknowledgment of the Mexican note was all that was called for in any event. But it is furthermore submitted that taking the language of Minister Romero's note in the light of all that had gone before, and especially in the light of the Mexican project of 1875 and the facts of Morteritos Island case and the Mexican contention, it is very questionable whether it is proper to give that language the unrestricted scope which it would have if standing alone. It is most respectfully submitted that when Señor Romero's language is construed, as it must be construed in the light of the facts of the case to which he had reference, and in the light of the previous attitude of both governments, it cannot be supposed that even in this note he really intends to lay down the fixed line theory as at present contended for by the Mexican Government.

^a U. S. Case Appendix, p. 669; Mexican Case, p. 47.

THE CONVENTION OF NOVEMBER 12, 1884.

The Case of the United States submits the following proposition :

“That the boundary treaty of 1884, between the United States and Mexico, formally adopts certain rules of interpretation which amount in substance to a codification of the opinion of Attorney General Cushing, which rules of interpretation are applicable to all changes in the course of the Rio Grande which have occurred since the river became the international boundary”. (Case of the United States, p. 44.)

In support of this proposition the United States submits the following points with references to the documentary evidence upon which they are based.

The United States contends, as it ever has, that the treaty of Guadalupe Hidalgo of February 2, 1848, was that that river should serve as a continuing water boundary regardless of changes on its banks or in its course by accretion; and that the treaty of December 30, 1853, made subsequent to the fixing of the river by survey as a boundary in 1852, ratified and confirmed the boundary “up the middle of that river” as a water or fluvial boundary.

Treaty 1848, U. S. Case App., pp. 18, 21, 23.

Treaty 1853, U. S. Case App., p. 51.

Survey of River 1852, Mexican Case, Annex No. 3, p. iii.

Survey of River 1852 (see Convention 1884, Article II, U. S. Case App., p. 68).

This assertion that in 1853 the river was considered a fluvial boundary is further demonstrated by the fact that between the survey in 1852 and December 30, 1853, when the second treaty was signed, the river had already undergone changes by accretion.

Mexican sheets No. 29; U. S. Case, Map 7.

United States sheets No. 29; U. S. Case, Map 6.

Joint Journal Chamizal case; U. S. Case App., p. 109.

Statement in Mexican case, p. 2.

Survey W. L. Diffendorffer, May 25, 1853; U. S. Case App., p. 143 (also 139).

Reference of Engineer E. Corella to same; U. S. Case App., p. 174.

Prior to the convention of 1884 several "questions" or "difficulties" had arisen between the two countries which had been considered or determined by their secretaries of state, or through their respective ministers, upon the principles of accretion and avulsion. There had arisen the apparent necessity of having a formal joint declaration or convention laying down rules for the determination of such questions.

Opinion Atty. Gen. Cushing 1856; U. S. Case App., p. 559.

The Brazos case 1867; U. S. Case App., p. 556.

Brownsville Wharf Co. Case 1871; U. S. Case App., p. 573.

Morteritos case 1884; U. S. Case App., p. 581.

Indeed the matter of a convention to determine such rules had been considered by both Governments, and drafts for such a convention had been submitted by the Mexican ministers at Washington to the Secretary of State on two or three occasions.

On December 2, 1875, Señor Don Ignacio Mariscal had left a draft of a convention with Secretary of State Hamilton Fish. (U. S. Case App., p. 578.)

Mr. Fish, on July 20, 1876, stated to Señor Mariscal that recent events seemed to make it especially desirable that there should be at once a definite arrangement providing "for the changes in the course of the Rio Bravo since the line was determined under the Guadalupe Hidalgo treaty of 1848." (U. S. Case App., p. 578.)

The drafts for a convention as printed in the two Cases are found as follows:

Draft March 25, 1875 (Mariscal), Mexican Countercase, Annex No. 3, p. xix.

Draft December 2, 1875 (Mariscal), Mexican Countercase, Annex No. 3, p. xx.

Draft May 31, 1884 (Romero), U. S. Case App., pp. 588-590.

In the letter from Minister Mariscal to acting minister of foreign affairs, Mexico, dated December 2, 1875, he states: "I said that no changes *which were not the result of alluvium* should alter the mathematical line determined by the commissioners." (Mexican Countercase, Annex No. 3, p. xxiii.)

Before analyzing the wording of the treaty of November 12, 1884, it may be well to state a little more fully the particulars of the cases which had arisen for the consideration of the two Governments prior to that time.

The first question which arose was the result of a threatened avulsive change in the valley of the Rio Grande near El Paso (U. S. Case App., p. 1129) and the question was referred by Maj. Emery to the Secretary of the Interior, who in turn referred it to Mr. Caleb Cushing, Attorney General of the United States. (U. S. Case App., p. 1129.)

Attorney General Cushing rendered a long opinion applicable to the subject of arcifinious boundary between two nations, in which the doctrine of accretion and avulsion is set forth with references to authorities to support the same, including quotations, as authority for Mexican jurists and statesmen, from the works on international law of the highest authority in Spain and Spanish America.

U. S. Case App., pp. 559-563.

Op. Atty. Gen., 13:175.

On January 9, 1867, Señor Romero, Mexican minister at Washington, brought to the attention of the Secretary of State instructions he had received from the Mexican foreign office dated December 5, 1866. (U. S. Case App., p. 557.)

In this communication the doctrine of accretion and avulsion was distinctly stated. In reply Mr. Seward, Secretary of State, forwarded to Señor Romero the opinion of Attorney General Cushing, above referred to, stating that the United States relied upon the doctrine therein enunciated. (U. S. Case App., p. 558.)

Minister Romero, upon the receipt of the opinion of Attorney General Cushing, expressed himself as follows:

That the principles enunciated therein are equitable and founded on the teachings of the most accredited expositors of international law. (U. S. Case App., p. 566.)^a

In the years 1871 and 1872 the two Nations considered the matter of certain works which were being constructed by a wharf company at Brownsville, Tex., certain Mexican citizens claiming that the work might interfere with the rights of the occupants on the Mexican side of the river. (U. S. Case App., p. 573.)

The Secretary of State had the matter investigated by United States Consul Thomas F. Wilson, located at Matamoros. In a letter from him which was referred to Minister Palacio March 7, 1872, Mr. Wilson stated that it was said the works might endanger a small Mexican settlement, Santa Cruz Point, located on the

^a See *supra*, p. 40.

"gradual accretions of the river since the treaty of 1848, composed of particles degraded from the American side, and consequently, being imperceptible accessions, the soil became Mexican." (U. S. Case App., p. 575.)

On March 11, 1872, Minister Palacio acknowledges the receipt of the above letter in a note in which he speaks of the frontier as "confused and altered by variations which have been produced in the river by natural causes." (U. S. Case App., p. 577.)^a

In the year 1874 there appears to have been presented to the Secretary of State of the United Mexican States a letter from the vice consul at Franklin in regard to the changes in the river at that point and at El Paso del Norte. This letter was referred by Señor Lafragua, secretary of foreign affairs, to the Mexican minister at Washington. In this letter Señor Lafragua states that his Government deems it expedient and necessary to enter into a discussion for the purpose of establishing a formal declaration of the meaning to be given to the corresponding treaty in regard to boundaries, and he further stated that the President of Mexico had suggested "that it be acknowledged that the constant boundary is the river, be it where it may; that the slow and successive increase of land does not constitute a change; but if the change be sudden the part cut off remains under the jurisdiction of the country to which it belonged before." (Mexican Case Annex No. 10, p. III.)

As above stated, this letter does not appear to have been transmitted to the Government of the United States. It appears from the records in the Mexican Embassy at Washington, however, that it was the subject of an interview between the Mexican Minister and the Secretary of State.^b

Up to the date of the convention of November 14, 1884, every time the question arose Mexico conceded in one form or another that land lost by erosion or gained by accretion was properly lost or gained. This principle is conceded even in the letter of Señor Lafragua to the Mexican minister at Washington dated September 12, 1874, although in that letter he does refer to the boundary as being invariable and fears that an avulsive change in the channel might render the boundaries indefinite and imaginary. The meaning of this letter taken as a whole is blind and uncertain, yet its purpose was to request the United States that a declaration be agreed to by both nations to construe the treaties of 1848 and

^a See *supra*, p. 42.

^b See *supra*, pp. 42-45.

1853 according to the ordinary international law the doctrine of avulsion and accretion. (Mexican Countercase Annex No. 10, pp. 3, 4.)

Although the language of various communications of subordinate Mexican officers at times seems to give countenance to the fixed boundary theory it is always commingled with other language which shows that the writers really had in mind the question of the effect of avulsive changes, while the correspondence of the Mexican Foreign Office and Mexican Embassy was almost free from suggestion of the fixed boundary theory. As already stated, it appears that up to 1884 only one diplomatic communication of the Mexican Government appears, even on its face, divorced from its context, to be a statement of the fixed boundary theory and that letter also when read in connection with the facts of the case under discussion, to which it is properly referable, loses its *prima facie* significance. (Señor Romero to Mr. Frelinghuysen, Oct. 9, 1884, U. S. Case Appendix, pp. 668 and 669.) The question as to the character and effect of certain changes in the river bed, particularly those at El Paso had given serious concern to the Mexican Government and the Morteritos Island question had impressed upon the Government of Mexico the desirability of putting on record the conclusion of the two Governments with respect to a change in the course of the river through the deepening of the channel. Out of these circumstances a desire had arisen on the part of both Governments to issue a declaration or make a treaty or convention that would fix definite rules of interpretation of the treaties of 1848 and 1853 so far as the rivers constituted the boundaries.

Minister Romero's letter, Feb. 6, 1867; U. S. Case App., p. 565.

Minister Palacio's letter, Aug. 11, 1871; U. S. Case App., p. 569.

Minister Palacio's letter, Mar. 11, 1872; U. S. Case App., p. 577.

Secretary Fish's letter, July 20, 1876; U. S. Case App., p. 578.

Minister Mariscal's letter, July 22, 1876; U. S. Case App., p. 579.

Minister Romero's letter, May 31, 1884; U. S. Case App., p. 590.

Señor Romero to Mr. Frelinghuysen, Oct. 9, 1884; U. S. Case App., p. 668.

Señor Romero to Mr. Frelinghuysen, Oct. 10, 1884; U. S. Case App., p. 671.

Draft of Convention, Mar. 25, 1875; Mex. Countercase, Annex No. 3, p. xx.

Draft of Convention, Dec. 2, 1875; Mex. Countercase, Annex No. 3, p. xxi.

Draft of Convention, May 31, 1884; U. S. Case App., p. 588.

The United States of America had consistently held to the doctrine of accretion and avulsion since its elucidation by Attorney General Cushing November 11, 1856. (U. S. Case App., pp. 559, 567.)

The convention of November 12, 1884, fixed definite rules for the determination of all questions arising concerning the changes in the two rivers where the boundary line follows the bed. The language of the treaty is clear and explicit. (See U. S. Case App., pp. 67, 68, 69.)

Its preamble makes three definite assertions—

(a) By virtue of article 5, treaty of February 2, 1848, and article 1, treaty of December 30, 1853, certain parts of the dividing line between the two countries *follow*^a the middle of the channel of the Rio Grande and the Rio Colorado.

(b) The convention is signed in order to avoid *difficulties*^a which may arise through changes of channel to which these rivers are subject through the operation of natural forces.

(c) The convention shall lay down *rules for the determination of such questions*.^a

Article I declares that the dividing line shall forever *follow*^a the normal channel of the river (as described in the treaty of 1848) without regard to natural alterations in the banks or in the *course*^a of the rivers, if the water does not abandon one river bed and open a new one.

Article II declares that the cutting of a new bed or the deepening of a new channel other than that which marked the boundary at the time of the survey, shall produce no change in the dividing line.

Article III provides that no artificial change in the navigable course of the river shall be permitted to alter the dividing line as determined in 1852 or by Article I of this convention.

Article IV: All international bridges over the rivers shall be marked exactly over the middle of the main channel which

^a Italics ours.

shall denote the dividing line for all the purposes of the bridge. (U. S. Case App., pp. 67, 68, 69.)

A simple reading of the text of the convention will clearly show that it was designed as a means, by prescribed rules, to settle all *future questions or differences*^a that might relate to changes in the river whether those changes were past or future. The language can not reasonably be construed to apply only to future changes in the rivers as claimed by the Mexican Agent. *It does not anywhere say so.*^a Its purpose was to avoid or settle disputes by giving rules of interpretation. It contemplated that the river had changed by erosion, accretion, and avulsion as any fluvial boundary might do. It expressly declared that by the treaties of 1848 and 1853 the dividing line had followed the middle of the channel.

Apply now the rules of interpretation which England submitted to the Emperor of Germany as arbitrator in the dispute between England and the United States over the settlement of the Northwest boundary between the United States and Canada, and see whether the interpretation as here given does not give the context, the spirit and the reason of the convention or treaty of 1884, and whether such interpretation is not a favorable one rather than an odious one.

Those rules of interpretation were as follows:

1. The words of a treaty are to be taken to be used in the sense in which they were commonly used at the time when the treaty was entered into.
2. In interpreting any expressions in a treaty, regard must be had to the *context* and *spirit* of the whole treaty.
3. The interpretation should be drawn from the *connexion* and relation of the different parts.
4. The interpretation should be suitable to the *reason* of the treaty.
5. Treaties are to be interpreted in a *favorable* rather than an odious sense.
6. Whatever interpretation tends to change the existing state of things at the time the treaty was made is to be ranked in the class of odious things.

The above rules are quoted in the Mexican Case, p. 32.^b

It has been argued in the Case of Mexico that the phraseology of the convention of November 12, 1884, using in many instances the future tense, in itself, demonstrated that the intention of the two Governments was merely to apply the principles enunciated by that convention to such portions of the river as might change

^a Italics ours.

^b The Mexican Case cites Wheaton's Events of International Law, 3d Edition, by A. C. Boyd, p. 394.

after November 12, 1884, and that the treaty did not apply to changes which had occurred in the location of the channel of the river prior to that date. In his statement applicable to this subject it is clear that the Mexican Agent has misinterpreted the words of the convention. Emphasis is laid upon the fact that in many cases verbs indicating the future tense are used, and the argument applies the verbs of the future tense to *changes in the river* which might arise instead of to *disputes* or complaints by either Government which might arise in the future. The language of the treaty itself does not apply to the alterations in the banks of the river which might arise in the future, but it expressly refers to the difficulties which may arise through changes of the channel. The difference between the two is manifest.

Mexican Case, pp. 20-25.

Mexican Countercase, pp. 31-34.

With the settlement of the Morteritos case there had been closed all difficulties or complaints which had arisen up to that time as far as is shown by the record. (Letter Minister Morgan to Secretary Frelinghuysen, U. S. Case App., p. 662.)

All of these difficulties or complaints had related to changes in the river, relating back over a number of years. The purpose of the treaty of November 12, 1884, was to furnish "bases for the final settlement of *similar* questions." (Letter Minister Romero to Secretary Bayard, U. S. Case App., p. 679.)

The difficulties concerning the river boundary which might arise thereafter, whether from prior or subsequent changes of the river, were to be interpreted according to the "rules" laid down by the convention of 1884. (Convention Nov. 12, 1884; U. S. Case App., p. 68.)

The understanding of the two Governments as to what was intended to be covered by virtue of the precepts of this convention is well shown by the language of the Presidents of the respective nations in the messages of each to his Congress at the time the convention was transmitted for ratification.

The President of the United States in December, 1884, transmitted for ratification the convention and described it as "touching the boundary line between the two countries where it follows the beds of the Rio Grande and the Rio Gila," and he added that "the convention is in accordance with an opinion of the Hon. Caleb Cushing, Attorney General, dated November 11, 1856." (U. S. Case App., p. 1134.)

The President of Mexico in September, 1885, stated to the Mexican Congress:

I equally urge the approval of the treaty made in Washington through our representative establishing *certain rules of interpretation* of the first article of the boundary treaty of December 30, 1853, to avoid difficulties arising from the constant changes in the course of the Rio Grande. (U. S. Case App., p. 1137.)

The treaty was ratified in September, 1886, and the President of Mexico, in his message to Congress, again referred to the treaty and stated that its "object was to *avoid questions* originating from the change of current in the Bravos and Colorado Rivers." (U. S. Case App., p. 1138.)

It is thus apparent that there was no misconception on the part of either Government as to the purpose of the treaty, or as to the fact that the location of the boundary line was in the middle of the channel of the river. There was nothing in the treaty to indicate that either Government considered that the location of the middle of the channel of the river, as that river was surveyed in 1852, was the dividing line between the two countries. On the contrary, the convention of 1884 expressly stated that "certain parts of the dividing line between the two countries *follow* the middle of the channel of the Rio Grande and the Rio Colorado."

With this interpretation nothing need be said to meet the argument in the Countercase of the United States of Mexico that the convention of November 12, 1884, was inapplicable and of no utility because the river in 1884 had wholly departed from the channel of 1882 in its upper and lower zones except for the points of intersection. (Mexican Countercase, pp. 18-22.)

Following the making of the treaty, the language of Señor M. Romero, in a letter addressed to the State Department of the United States, December 26, 1885, indicates that the treaty established rules for the decision of such *questions* as may arise owing to changes, past or future, in the channel of the river. (U. S. Case App., p. 684.)

In January, 1888, the United States collector of customs of the district of Bravos Santiago, of the State of Texas, urged the Department of State through Mr. W. H. Crane, a member of Congress from Texas, that it was necessary to determine in some definite way whether the changes in the river had arisen through erosion, accretion, or the other causes set forth in the treaty of 1884. (U. S. Case App., p. 693 and following pages.)

In February of that year Minister Thomas B. Connery, in an interview with Mr. Mariscal, secretary of state of Mexico, reported that the Mexican Government had as yet devised no plan for determining questions arising under the last boundary convention. Mr. Connery states as follows:

He (Señor Mariscal) remarked that the original boundary lines could always be determined by the maps which formed part of all the Treaties made since 1848—that of Guadalupe-Hidalgo down to the Boundary Convention of November 12, 1884. In all those Treaties, said Mr. Mariscal, the old Roman principle had been adopted—namely that the sudden and great diversion of a river course would leave the boundary line where originally fixed by Treaty prescriptions, and that only *the gradual changes, operated by natural causes, through erosion, deposit of alluvium, and such like agencies, could effect an alteration of the boundary lines.*^a (U. S. Case App., p. 699.)

In the years 1885 to 1888 the Mexican Government constructed on the Mexican bank of the river opposite El Paso certain jetties or wing dams to prevent the washing away of the banks on that side. Complaint was made by citizens of El Paso, Tex., that the wing dams were likely to cause a deflection of the current against the Texas side of the river and materially damage the land, which was composed of alluvial deposits on that side of the river.

The construction of the wing dams at Juarez by the Mexican Government was in charge of Señor Don Ignacio Garfias, as engineer.

In a letter which he wrote to Señor Matias Romero, minister of Mexico at Washington, he protested against the complaints made by the people of El Paso against the erection of Work No. 6. In this letter he states that he had the right to do the work where it was in the current of the river, and that Mexico even had the right to do the work on the left (El Paso) bank, within the legal boundary line drawn in 1852. (U. S. Case App., p. 721.)

Concerning this matter Señor Romero on November 15, 1888, held a conversation with Mr. A. A. Adee, Assistant Secretary of State, at Washington. He presented the claim and argument of Señor Garfias, showing to Mr. Adee the report of Señor Garfias:

Mr. Adee remarked that the argument of Mr. Garfias rested on the avowed assumption that the left bank of the river at El Paso, as well as the right bank, belonged to Mexico, and that any interference with the current within the territorial limits so claimed would not conflict with article 3 of the treaty of 1884.

Mr. Romero said that article was not retroactive and only concerned the changes in the river which might occur after it was proclaimed, and that the changes at El Paso had taken place long before 1884, and

^a Italics ours.

therefore were determined by the treaty of Guadalupe Hidalgo, and followed the line actually existing in 1852.

Mr. Adee said that would be a very serious contention if it should be advanced on behalf of Mexico; that he and Mr. Romero had jointly negotiated the convention of 1884, and *that its object was to apply consistently and completely the doctrines of international law to the determination of the questions raised by the shifting boundary of the river*; the fact that Señor Garfias had advanced so untenable a proposition showed that his information in regard to the work was partial from the outset, and justified the desire and expectation of this Government that an independent examination of the actual facts of the construction of this dam should be uninfluenced by any local sentiment for or against it.

Mr. Romero said that Mr. Garfias was no lawyer—only an engineer; *that he did not know that any such contention with respect to the actual boundary line was contemplated*; that he (Mr. R.) thought Mr. Garfias only referred to the popular impression existing in Ciudad Juarez, and *that if there was any chance of the extract from Señor Garfias's letter being regarded as an assertion of such a doctrine he would withdraw that letter*.

Mr. Adee said he saw no occasion for withdrawing the letter or regarding the subject as open for discussion unless the proposition should be formally advanced by the Government of Mexico. (U. S. Case App., p. 724.)^a

Engineer Garfias's contention of a fixed line was never taken up by Mexico. Maj. O. H. Ernst was designated by the United States Government to examine the works or wing dams at El Paso; he did so in conjunction with Señor Garfias, and reported that in his opinion the last wing dam erected might be injurious to the American side of the river. Before Maj. Ernst reported, Minister Romero had presented a draft for a convention to provide for an International Boundary Commission to settle all questions arising as to changes on the Rio Grande boundary, and that draft, with slight alterations, was duly signed as the convention of March 1, 1889. (U. S. Case App., pp. 745, 785.)

Mr. Bayard, Secretary of State, in a letter to Señor Romero, dated February 27, 1889, had approved Señor Romero's draft, and expressed himself that the new convention would settle all questions connected with the fluvial boundary between the two countries. All the correspondence indicates that the convention of 1884 had provided the rules for determining all changes in the river since the treaty of 1848. Indeed, in his letter to the Secretary of State of May 22, 1889, stating that he was ready to effect the exchange of ratifications of the convention, Señor Romero states that the International Boundary Commission was "charged with applying the principles established in the convention signed November 12, 1884, respecting the changes that *have taken place*"^b

^a Italics in this quotation ours.

^b Italics ours.

in the channel of the Rio Bravo del Norte in that part which serves as a boundary line between the two countries."

Señor Romero's letter, U. S. Case App., p. 785.

Mr. Bayard's letter, U. S. Case App., p. 752.

Señor Romero's letter, U. S. Case App., p. 755.

Mr. Bayard's letter, U. S. Case App., p. 757.

Maj. Ernst's report, U. S. Case App., p. 758.

Señor Romero's letter, U. S. Case App., p. 782.

While the convention of 1884 established the rules upon which all disputes which arose should be settled, there existed no machinery by which those rules could be applied except through the diplomatic agencies.

The officials of both nations saw the need of a Commission to pass on the questions arising.

Secretary Mariscal, U. S. Case App., p. 699.

Secretary Bayard, U. S. Case App., p. 706.

The United States House of Representatives on September 25, 1888, passed a resolution authorizing the President to negotiate with the Government of Mexico for the creation of an International Boundary Commission to determine all questions concerning the boundary line under the rules laid down in convention, November 12, 1884. (U. S. Case App., p. 1151.)

On March 1, 1889, a convention was signed between the United States and Mexico, to establish the present International Boundary Commission to carry out the principles contained in the treaty of November 12, 1884. By its terms the convention was to remain in force for the period of five years from the date of the exchange of ratification. Ratifications were exchanged December 24, 1890, and by conventions signed from time to time since, the terms of the treaty or convention have been kept in operation. (U. S. Case App., p. 72.)

The provisions of this convention of March 1, 1889, were that all differences or questions that might arise on the frontier where the Rio Grande and Colorado rivers form the boundary line, whether from alterations or changes in the bed, or from works constructed in said rivers, "or of any other cause affecting the boundary line," shall be submitted for examination *and decision* to an International Boundary Commission with exclusive jurisdiction. (Convention Mar. 1, 1889, Art. I; U. S. Case App., p. 73.)

Its decision shall be binding on both Governments, unless one of them shall disapprove it within one month from the day on which it shall have been pronounced. (Convention 1889, Art. VIII, U. S. Case App., p. 75.)

A perusal of this convention, or treaty, leaves no doubt of the intention on the part of both Governments that *all* differences or questions concerning any alterations or changes in the rivers should be decided by the commissioners. Its spirit and language clearly indicate a fluvial boundary. It expressly states in three places, i. e., in the preamble, in Article I and in Article IV, that the rivers themselves form the boundary line. It would seem to negative any idea that Mexico then desired that the fixed line theory should be recognized.

The words of the treaty follow closely those of the draft made by Señor Romero, and presented to the United States State Department December 4, 1888, which Señor Romero states had been approved by the Government of Mexico.

Draft, U. S. Case App., pp. 744, 745.

Convention, U. S. Case App., p. 72.

Ratifications of the convention of March 1, 1889, were not exchanged until December 24, 1890. In the meanwhile the treaties had been ratified by the Senates of the two Nations.

The President of the United States in March, 1889, transmitted the convention to the Senate for its consideration, and at that time stated that it "provided for the institution of an international boundary commission to determine questions between the United States and Mexico arising under the convention of November 12, 1884, by reason of changes in the river bed of the Rio Grande and the Colorado River *when forming the boundary between* the two countries." (U. S. Case App., p. 1139.)

The language here quoted shows that in the view of the United States authorities the conventions of 1884 and 1889 fixed rules to determine all changes in the river so long as it had formed the boundary between the two countries.

The language of the President of Mexico in his message in April, 1889, shows that in the view of the Mexican authorities the scope of the treaties gave the International Boundary Commission exclusive jurisdiction in deciding "*all questions* regarding the boundaries as defined in those rivers."

In his message in September, 1890, the President of Mexico refers to the convention of 1889 as "calling for the creation of an international boundary commission to settle *whatever questions* might arise from the changes occurring in the channel of the Bravo and Colorado Rivers where the same serve as a dividing line between the United States and Mexico." (U. S. Case App., p. 1139.)

In his message of April, 1891, the President of Mexico refers to that convention "for the establishment of an international commission to study and determine *pending boundary questions or those that may arise*" by reason of the variations in the course of the rivers. (U. S. Case App., p. 1140.)

In his message of April, 1892, the President of Mexico refers to the convention of 1889 as establishing a joint commission charged with the adjustment of *pending* questions or which may arise concerning the boundary line by changes in the course of the river, by works constructed therein, or "any other incident which may affect our boundary in those rivers." (U. S. Case App., p. 1140.)

In subsequent messages by the President of Mexico down to the making of the treaty of 1905 relating to bancos, he refers to the conventions of 1889 and nowhere indicates that the powers of the boundary commission are limited in determining questions relating to changes in the Rio Grande at any specified time. (U. S. Case App., pp. 1137 et seq.)

The President of the United States in his messages in December 1891, December, 1898, and December, 1899, refers to the matter in a somewhat similar way. (U. S. Case App., p. 1135.)

In no one of the messages of the Presidents of Mexico or of the United States is there anything to show that the treaties of 1884 and 1889 were not retroactive or not designed to cover any question arising concerning any change in the rivers from and after 1852. Nor is there an intimation that there was an invariable boundary line fixed in the treaties of 1848 and 1853.

The learned Mexican Agent in his Countercase admits that the messages of the President of Mexico do not sustain the construction he attempts to give to the treaties named. He states that those messages of the President of his country attribute to the conventions a scope which they never had. (Mexican Countercase, pp. 29-31.)

To again illustrate that it was clearly the understanding of both Governments that the conventions of 1884 and 1889 related to all changes which had taken place in the beds of the rivers Grande and Colorado, reference is made to a portion of a letter dated November 27, 1890, from Señor M. Romero, minister plenipotentiary of Mexico to the United States, to Hon. James G. Blaine, Secretary of State, viz:

I have the honor to inform you that I have received the copy ratified by the Mexican Government of the convention signed in this city on March 1 of 1889, between the United Mexican States and the United States of

America, to establish an international commission of boundaries that may know (try) the questions which may arise owing to the changes *which have taken place*^a in the beds of the rivers Bravo del Norte and Colorado in the part which serves as a division line between both countries. (U. S. Case App., p. 828.)

Again, in a letter to Secretary Blaine, dated November 3, 1891, Señor Romero refers to the international commission about to be appointed as one "which has to adjust the *questions pending* concerning boundaries," etc. (U. S. Case App., p. 836.)

In pursuance of the provisions of the convention of 1889, both Governments have referred, at various times, different questions which have arisen along the river, to the International Boundary Commission established under such treaty. Many of these questions, upon investigation, have involved changes of the river, due both to accretion and avulsion occurring many years prior to the treaty of 1884, and the commissioners, under such treaty, in their decisions and the two Governments in not disapproving such decisions, have repeatedly affirmed that the convention of 1884 was a treaty of definition or interpretation of the meaning of the treaties of 1848 and 1853, making the Rio Grande a fluvial water boundary between the two countries forever and have assented to the fact that such treaty of 1884 was retroactive and also authoritative on all questions of changes in the river.

Banco de Surron case: U. S. Case App., pp. 808, 826.

• The Lopez case: U. S. Case App., pp. 837, 862.

Reynoso case: U. S. Case App., p. 843.

San Elizario case: Proceedings of the International Boundary Commission, pp. 101 to 116. See Countercase of the United States, pp. 15-18.

Cattle Seizure below El Paso: U. S. Case App., p. 941.

Also many other cases.

In January, 1890, Señor Romero called the attention of the State Department to a complaint that some American citizens were building a fence on the "Banco de Surron" and claiming the land as formed by accretion prior to 1884, and were threatening to hold it by armed force. The title to the land depended upon whether the land had formed by accretion. Both Governments agreed that it was a question for the examination and decision of the boundary commission. (U. S. Case App., pp. 808, 812, 827.)

This matter afterwards came in due course before the International Boundary Commission and was settled by the treaty for the elimination of the bancos.

^a Italics ours.

Early in 1893 a question arose in regard to the ownership of about 3,800 acres of land near Rio Grande City, Starr County, Tex., opposite Camargo in the State of Tamaulipas, Mexico. The American owners, José Maria Lopez and others, claimed that the 3,800 acres had formed by accretion to the land on the American side of the river and that they had owned and cultivated the land without objection by Mexican citizens or Mexican officials, and that they had grown a large number of valuable trees on the land. The action of the river placed this land with its improvements on the Mexican side of the river, and it continued to be cultivated by said Lopez and his associates until a Mexican officer, named Luis Izaquirre, warned them off and seized the land, claiming it as Mexican territory. It was further claimed that the land had formed by gradual erosion and *deposit of alluvium since 1865*, and that in September, 1892, the land was cut off to the Mexican side by the abandonment of the existing river bed and the opening of a new one. The matter was brought by the United States authorities to the attention of the authorities of Mexico, and upon investigation it was contended by the Mexican authorities that the channel which the river took in September, 1892, was the old channel of the river which was fixed by the International Boundary Commission in 1852 as the deepest channel of the river and which the river abandoned for the new one in 1865. Señor Mariscal, in a letter to the United States minister, dated September 28, 1893, refers to the convention of 1884, and states that under it the deviation of the river current "such as occurred in 1865 could not alter in any way the boundary line." The Secretary of State of the United States stated that he would bring the case with kindred cases to the attention of the boundary commission when organized. (U. S. Case App., pp. 837 to 843, 855 to 862.)

This is the case which, when subsequently brought before the International Boundary Commission is known as the case of the Banco de Camargo. (See *infra* p. 73.)

In September, 1893, the United States Government represented to Mexico that two American citizens were arrested and their sheep seized by Mexican officials on American territory bordering on the Rio Grande near *Reynosa*, Tamaulipas. About the same time the Mexican Government represented to the United States that four Mexican citizens had been arrested on the same territory by American soldiers. The trouble in both instances arose from the fact that the local citizens and authorities of both

nations each claimed as their own land which had formed on the edge of the river in part prior to 1884. As it was a question of the nationality of the territory, the two Governments agreed to release all those arrested and restore the sheep, and refer the question as to which nation the territory belonged to the International Boundary Commission as soon as it should be organized. (U. S. Case App., pp. 843, 848, 894.)

The commission was organized for work on January 4, 1894.

In 1891 the collector of customs at El Paso, Tex., seized certain cattle at a ford on the Rio Grande between the villages of Isleta and Zaragoza, below El Paso. A claim was presented by certain Mexican citizens for damages by reason of such seizure. Disputes arose as to whether the cattle were seized on Mexican or United States territory, and, after considerable diplomatic correspondence, the question was referred to the International Boundary Commission under the conventions of May 12, 1894, and March 1, 1889 (U. S. Case App., pages 904, 928, 930, and 932). The Boundary Commission were unable to determine from the testimony as to whether the whole of the cattle or any part of them were seized on American or Mexican territory and so reported. In this joint report an admirable description of the shifting of the bed of the Rio Grande is given as showing the variation of the boundary since 1852; nothing was said of the theory of a fixed line; the decision of the commissioners being that because of such changes it was wholly impossible to determine in September, 1897, within several hundred yards "where the boundary line was at the time of the confiscation of the cattle and the arrest of the man on the 15th day of September, 1891." (U. S. Case App., p. 942.)

After the convention of March 1, 1889, became operative controversies arose in regard to certain territory on the river called "bancos." Several of these questions were referred to the International Boundary Commission for determination. These bancos were formed by accretions to the land on one side of the river with erosion on the other side until the channel of the river ran on a curve, and in the course of years it reached a time when the force of the current would make an avulsive cut-off or new channel, leaving an island between the new and the old channel. The commissioners in a joint report or journal on January 15, 1895,

after long and deliberate consideration concluded concerning bancos that their process of formation, their form and constantly changing character could not have been contemplated by the convention creating the treaties of 1884 and 1889, and the commission recommended an amendment or reconsideration of Articles I and II of the treaty of 1884. The reason for this recommendation was that the cut-off would clearly be an avulsive change, and would not change the boundary line. The front of the banco on the river might average 200 yards, the report states, while the length of the boundary following the old bed might average four or five miles. There were forty or fifty of these bancos and by following the old channels it would add to the length of the boundary line several hundred miles. The joint commission recommended to both Governments that the new cut-off be not deemed to have the effect of an avulsion, but be considered as the real river channel, thereby straightening the boundary and removing possible causes of dispute which would not be as apt to arise when the territory of each nation reached to the river. While this innovation was a departure from the doctrines established both by international law and by the treaty of 1884, yet in course of time it culminated in the treaty of March 20, 1905. (For joint journal Boundary Commission on bancos, see U. S. Case App., p. 1092.)

As a further illustration that the Mexican Government has always recognized, in the matters that have arisen, that the convention of 1884 was in its effect and operation retroactive, and that the theory of a fixed line has never been advanced or put into effect, attention is called to the cases of four bancos which were surveyed and a probable decision announced by the joint commission in September, 1895.

In the case of the *Banco de Camargo*, the commission found that as early as 1865 a gradual erosion began on the Mexican bank and deposit on the American bank, which continued for 27 years, when in 1891 a sudden avulsion cut off the accretions which had formed. The commission decided that, according to Articles I and II of treaty of 1884, the banco belonged to the United States. (U. S. Case App., p. 1102.)

In the case of the *Banco de Vela*, a similar condition of things existed, except that the accretions began in 1853 and the avulsion around them came in 1865. (U. S. Case App., p. 1103.)

The case of the *Banco de Granjeno*, was similar, except that the accretions were going on as early as 1853 and the avulsion occurred in 1870. This banco was deemed in the probable decisions to belong to Mexico. (U. S. Case App., p. 1104.)

In the case of the *Banco de Santa Margarita*, a similar condition of things also arose, except the accretions were going on in 1853 and the avulsion cutting across them occurred in 1880 or 1881. (U. S. Case App., p. 1105.)

All these cases were subsequently disposed of by the Treaty for the Elimination of the Bancos, of 1905.

From correspondence that passed between the two Governments in February and March, 1894, it appeared that the two Governments had referred to the boundary commission the matter of the demarcation of the dividing line between the towns of El Paso del Norte (now Juarez), Mexico, and El Paso, Tex., and the matter of the demarcation of the line on the international bridges under the convention of March 1, 1889. In a letter dated March 12, 1894, Señor Romero informed the Secretary of State that as the Government of Mexico had reason to think that the bed of the Rio Grande *had changed* in that place since the boundary as determined in pursuance of the treaty of Guadalupe Hidalgo, the first question to be decided is *where the boundary line between these towns passes*. (U. S. Case App., pp. 886-889.)

The International Boundary Commission fixed the boundary line between the city of El Paso del Norte, Mexico, and El Paso, Tex., but the President of Mexico disapproved the decision. (See U. S. Case App., p. 899.) The reasons for such disapproval are shown in a letter from Señor Mariscal to Señor Osorno, Mexican commissioner, dated June 29, 1894. The fundamental reason then stated is as follows:

4th. That Citizen Pedro Y. Garcia having formally presented a claim, alleging that land called "El Chamizal," belonging to Juarez City became joined to land of the United States *through a violent change in the course of the river Bravo*, in order that it may be declared to belong still to Mexico, the Commission must examine and decide that case, and consequent upon the decision, not before to settle the dividing line between Juarez City and El Paso, Texas." (U. S. Case App., pp. 902-903.)

One of the chief cases which came before the Boundary Commission was the case now under consideration known as El Chamizal. The commission in this case took a large amount of testimony, both orally and by deposition, and the engineers for both Governments made examinations and reports. At the

conclusion of the examinations, as will be stated more fully in this brief when the question of accretion of the land to the American side will be considered, the commissioners disagreed. Their disagreement arose solely upon the question as to whether the manner in which the banks on the Mexican side of the river were washed away could be termed slow and gradual erosion, within the meaning of the provisions of Article I of the convention of 1884.

The Chamizal Case was presented on November 4, 1895, and the arguments therein were closed on July 13, 1896. Two opinions were prepared by Señor Osorno, the Mexican commissioner, containing a close and careful consideration of every question involved; and during the entire hearings and discussions the theory that the line established by the commissioners in 1852 was a fixed and invariable line was not relied on.

The private claimant in whose behalf the question was raised, Pedro I. Garcia, asserted in his petition that he owned the land from 1866 until the time of the hearing, and that in 1873, by an abrupt and sudden change of the current of the river, the land was left on the other side of the river. Although this change is stated to have occurred 11 years before the treaty of 1884 was signed, yet during the entire period in which the case was under consideration before the commission it was not suggested, as it now is for the first time, that the commission had no jurisdiction for the reason that the treaty of 1884 was not retroactive. The commission in this case, as in all others, construed the treaty of 1884 as applicable to all changes in the river which occurred after 1852. (U. S. Case App., pp. 104-213.)

The contention in the Mexican Countercase that Señor Osorno was a subordinate officer whose action could not bind the Mexican Government, because the joint decision must first be approved by the government, in no wise breaks the force of the first trial of the Chamizal Case as an admission on the part of the Mexican Commissioner and the Mexican Government that the Treaty of 1884 is applicable to an avulsion which took place in 1873.

The manner of the formation of this tract will be considered hereafter under the heading of accretion. It may be well, however, to state here that the land which Mr. Garcia owned under the name of El Chamizal tract embraced, according to the dimensions given in the original survey, between 1 and 2 acres before any of it was washed away. The land now under consideration, which has formed on the American side of the river, contains about 600 acres. (Mexican Case, p. 5, Annex No. 7, p. xiv.)

As has been stated in the United States Countercase, pages 11 to 14, inclusive, the El Chamizal case was submitted to the Boundary Commission by Señor Mariscal under articles 1 and 4 of the conventions of 1884 and 1889.

U. S. Countercase, pp. 11 to 14.

U. S. Case App., p. 106.

Another very important case was submitted to the Boundary Commission under the provisions of the treaties of 1884 and 1889, which shows, perhaps better than any other case, the application of the principles of erosion and evulsion, and shows conclusively that the Government of Mexico did not rely upon the theory that the 1852 boundary was a fixed line, or that the treaty of 1884 was not intended to apply to any case where the changes in the banks of the channel of the river occurred prior to 1884. The case referred to is that of the island of San Elizario. It was presented by the Mexican commissioner November 4, 1895. (U. S. Case App., p. 104.)

The case is stated at length in United States Countercase (pp. 15 to 20), inclusive, to which reference is made for a more extensive consideration of the case. The map on page 109 of the proceedings of the International Boundary Commission shows the location of the channel as marked by Salazar, 1852; another as marked by Emory, 1852; and the third one, marked "old river channel abandoned in 1858." These channels, while all lying within a narrow compass, have substantially nothing in common except their points of intersection. The commissioners examined the case and found that the changes up to 1858 had occurred through erosion and deposit of alluvium, the change in 1858 by avulsion. The commissioners therefore, following the rules laid down in the treaty of 1884, relocated the old boundary line in the "old river channel abandoned in 1858." This decision of the commissioners, not being disapproved by either Government, became final and conclusive.

Report Int. Bound. Com., pp. 101 to 116, incl.

Treaty 1889, art. 8, U. S. Case App., p. 75.

In 1898 Señor Blanco, the Mexican commissioner, presented to the American commissioner a claim concerning the nationality of a certain extension of land separated by the Rio Grande from the Mexican side to the American side known as *Real de San Lorenzo*, and situated three or four miles below the city of El Paso. The land had formed, as shown by the report of the engi-

neers of the joint commission, progressively over a period of 50 years by the process of accretion, followed by an avulsive cut-off in the year 1898. The land embraced an area of some 400 acres. The engineers reported that in their opinion it was, without question, a banco formed by avulsive action. (U. S. Countercase App., p. 106.)

The matter being deemed a banco, the consideration of the manner of the formation of the land was deferred until such time as the banco treaty might be signed and ratifications exchanged.

After the exchange of ratifications on November 18, 1907, the Mexican commissioner, Señor Puga, in a letter addressed to Gen. Mills, the American commissioner, recited the facts of the former presentation of the case and requested that it be now given consideration. In this letter and in all of the proceedings which followed it before the joint commission, including the taking of the testimony of several witnesses and the reference to and the report by the respective engineers of the commission, not a single reference is made to the theory that the boundary line as established by the treaty of 1848 and designated on the maps by the commissioners in 1852 was a fixed and invariable line; nor was it anywhere claimed during the course of the proceedings that the treaties of 1884 and 1889 were inapplicable to a case like this, where the accretions had been forming for a period of 25 years prior to the signing of the treaty of 1884. (U. S. Countercase App., pp. 89-122, incl.)

The frequency of change of the river bed is well illustrated in the case of the banco of San Lorenzo, by the fact that five distinct maps made in the years 1852, 1889, 1899, another in 1899, and 1907, show different locations of the river bed. (U. S. Countercase App., p. 117. Portfolio Map No. 9.)

The decision in the case of the Banco San Lorenzo, as well as other pending banco decisions, is being withheld by the International Boundary Commission at the request of the Government of Mexico. (See U. S. Case App., pp. 373, 380, 383, 385, 427, 428, 440, 444, 445.)

Between the banco de San Lorenzo and El Paso there is another extension of land which is known as the Bosque de Cordova. It was given the banco form by an artificial cut-off made by the consent of the two Governments in 1900. (U. S. Countercase App., p. 64.)

The island so formed was marked by monuments by the boundary commission for the purpose of identifying the river bed as it ran at the time of the cut-off. (U. S. Countercase App., p. 69.)

The area of the tract is about 370 acres, of which 237 acres has formed by accretion to the Mexican bank since the survey of 1852. The area of the tract has varied from time to time, as will be seen by reference to map made by Consulting Engineer W. W. Follett. (U. S. Countercase Portfolio Map No. 9.)

It may be well to remark in passing that, on the theory of the present Mexican position, this land north of the survey of 1852 would still belong to the United States territory.

In placing the monuments around the Bosque de Cordova, the Mexican Commissioner assented to their being placed in the center of the channel of the river as it ran in 1899 and in a letter of Señor Puga to Señor Mariscal, Secretary of Foreign Relations, under date of March 14, 1907, it is suggested that monuments be placed in addition to those which were already fixed in order to more clearly define the old line "inasmuch as the dry channel is becoming more obliterated as time goes on." In the letter referred to, Señor Puga states as follows:

According to the treaties in force, the boundary line between Mexico and the United States should be the center of said channel and it is also this very line which divides the estates situated in the two countries and belonging in part to the said persons.

If this statement is correct it would entirely conform to the attitude of the United States in the present case and would effectively set at naught the contentions of a fixed boundary line, and also that the claim that the rules established by the treaty of 1884 were not retroactive. (U. S. Countercase App., p. 75.)

In the Countercase of Mexico it is asserted that the reference by the Secretary of Foreign Relations, Señor Mariscal, of the El Chamizal case, to the Mexican Boundary Commissioner was merely a formal act in forwarding the petition of Pedro I. Garcia. That the act of Mariscal was not merely formal but decisive and personal is shown by his letter dated October 29, 1894. In that letter he states that the fiscal attorney of the district court of Paso del Norte had instituted two investigations with the view of ascertaining the changes that had occurred in the current of the river from the New Mexico line to a point 2 leagues to the east of said city, and covering the period from February 2, 1848, to September 4, 1894. The cases were sent with instructions to investigate and arrive at a decision, as called for by the treaty.

The letter is important as showing that Señor Mariscal did not regard the boundary of 1852 as a fixed line, and also that he viewed all the changes in the river both before and after the Convention of 1884 as necessary to a decision of the case. (U. S. Case App., p. 106.)

It is worthy of comment that in a letter by Señor Don Igno Mariscal, Secretary of Foreign Affairs for Mexico, dated May 1, 1899, addressed to Chargé d'Affaires, American Embassy, Señor Mariscal states concisely his understanding of the doctrine which applies to the Rio Grande as a fluvial boundary and approves the elimination of the bancos by a new treaty outside of that doctrine, as follows:

I have laid your communications, and all matter relating to the case, before the President of the Republic, and by his direction I have the honor to inform you that Mexico, like the United States, is decidedly in favor of the elimination of the *bancos*, judging it to be the only way to avoid questions of sovereignty and jurisdiction. *Under the old and accepted system which we have applied to the Bravo, that of using rivers to define the frontier boundary*, it must be accepted as an invariable basis that one bank belongs to one country and the bank opposite to the other. The actual boundary, where the bancos are situated, interferes with the application of this basis, and therefore nothing is better than to eliminate, granting that it is not only possible but easy, the elements which interfere with it.

The references made by the Agent of the United Mexican States to the constitution and laws of Mexico and of the United States of America and to many decisions of courts and to other authorities for the purpose of showing that the treaty or convention of November 12, 1884, could not be retroactive, are not, we submit, of much practical value in reaching a conclusion upon that point. The general principles of law thus enunciated, whether sound or not, have no application to a treaty of interpretation laying down rules for the construction of the meaning of the language of a prior treaty. Such a treaty of interpretation is nothing more than a declaration by the two nations of the laws or rules applicable to the former treaty, and the latter treaty becomes in effect a part of the former one.

**THE BOUNDARY TREATY OF 1884, AS INTERPRETED BY THE BANCO
TREATY OF 1905.**

The learned Agent of Mexico has been at much pains to show that the international title to "El Chamizal" should not be resolved "solely in accordance with the principles established in the Convention of the 12th of November, 1884." (See Mexican Case, pp. 17 to 30.) He even goes further and seeks to exclude the Convention of 1884 from any part in the settlement of this cause, saying that "it must be concluded that the precepts of the Washington Convention dated 12th of November, 1884, neither are nor can be applicable to the El Chamizal case, and that therein may not be found the principles on which the legal decision of the said case should be based." (See Mexican Case, p. 17.) To this end he invokes the doctrine that treaties, being laws, "can not have retroactive effect." (See Mexican Case, p. 25.) To this it would seem to be sufficient to answer that the Preamble of the Convention for the Arbitration of the Chamizal Case expressly declares the desire of both Nations to terminate the dispute "in accordance with the various treaties and conventions now existing between the two countries, and in accordance with the principles of international law." (See U. S. Case App., p. 3.) Because it is admitted that this tribunal is not precluded from the consideration of all the treaties and conventions subsisting between the two Governments, shall it be concluded that that treaty shall be disregarded which was the latest between the Nations and in furtherance of which the International Boundary Commission had been created and in conformity to which this identical case had once proceeded to trial?

The learned Agent for Mexico does not need to be reminded that the rule against retroactivity of laws does not apply to Statutes of Construction or Interpretation. That the Treaty of 1884 was such a law appears most forcibly in the language of the illustrious President of Mexico to the Mexican Congress in 1885, to wit: "I equally urge the approval of the treaty made in Washington * * * establishing certain rules of interpretation of the first article of the boundary treaty of December 30, 1853" (see U. S. Case App., p. 1137), as well as from the explicit language of Secretary Frelinghuysen to the Chairman of the Committee of Foreign Relations of the United States Senate, to wit: "The present convention, then, provides for no new boundary line, but only for

deciding questions arising under the original treaty demarcation, according to definite principles recognized by International Law." (See U. S. Case App., 1122.) Numerous and convincing are the facts revealed in the record in this case and cited in this brief to show that the Convention of 1884 was intended by the high contracting parties to apply to "all differences or questions that may arise on that portion of the frontier * * * where the Rio Grande * * * forms the boundary line," and that it has been so interpreted by the Representatives of both Nations, including the International Boundary Commission.

The Agent of Mexico realizes this and he seeks to escape the overwhelming force of this construction by saying that his Government has not approved the acts of its various representatives in this respect. He even goes so far as to repudiate and hold for naught the executive messages addressed by the President of the Republic to its Congress. (See Mexican Countercase, pp. 27-31.) The Mexican Ambassador himself, realizing too well the universal application as well as the logic of the rule which forbids nations as well as individuals to escape from the natural results of their own acts, endeavors to escape from the dilemma in which he is placed by saying "that the Mexican Commissioner's opinion touching the El Chamizal case in 1895 * * * is nothing but an expression of the views of a high official of our Government without its official sanction." (See U. S. Case App., 409.)

Whether or not that position be sound it cannot be denied that the Banco Treaty of 1905 was the sovereign act of the Government of Mexico. It remains then to inquire whether the Government of Mexico has by the terms of the Banco Treaty of 1905 given to the Convention of 1884 a retroactive effect.

For if it has, it cannot now be heard to ask this tribunal to place upon the Convention of 1884 a different construction than that which that Government has placed upon it by the most solemn executive and legislative act known to nations. Let us then inquire what bearing the Banco Treaty of 1905 has on this question, and what light can be shed upon the intent, purpose and understanding of the parties thereto by an analysis of the convention of 1905 and the correspondence and negotiations leading up thereto. No sooner had the International Boundary Commission entered upon the practical discharge of its duties than it became reasonably apparent that the application of the principles enunciated in the Treaty of 1884 would hamper and complicate instead of simplifying the administration of govern-

mental authority on the banks of the Rio Grande. And so we find in 1895 the Boundary Commission recommending to their respective governments the negotiation of an additional treaty, for the purpose of eliminating from the provisions of the convention of 1884 certain typical alterations in the river's channel which were due to the gradual and erosive alteration of the river's course, supplemented by an avulsive tearing through of the narrow necks thus gradually formed by the action of the current.

It will be noted that the recommendation of the commissioners, when first submitted to their governments, was not entirely understood by the executive officers of the Mexican Republic. And so we find the Mexican Government calling for additional topographical data regarding the Rio Bravo and proposing to the Government of the United States that "both Governments would issue new instructions to their commissioners, so that, profiting by the sure and precise data to be obtained from the forthcoming map to be drawn of the said river from Rio Grande city to its mouth, as per approval of both Governments, they may render a more detailed report" ^a which would enable the respective governments to proceed to the amendment of the treaty. Therefore, it can not be doubted that when the Banco Treaty of 1905 was negotiated and signed, the representatives of both nations were specifically and accurately advised as to the conditions which that convention was designed to remedy.

It will be observed that the Agent of Mexico labors to prove that the "bancos" upon the lower river were not within the terms of the Treaty of 1884. And to this end he seeks to show that the provisions of that Convention could not be applied to the bancos. (See Mexican Countercase, p. 19.) It was not, however, the difficulty of applying the rules laid down in the Convention of 1884 to the conditions discovered by the Boundary Commission that impelled them to recommend to their Governments an amendment to the treaty, but rather it was the inconvenience that would result from the application of those principles to the "bancos." (See U. S. Case App., pp. 1092-1097.) So far is it from being true that the Commissioners could not apply the principles of the treaty of 1884 to the "bancos," the record shows that they were prepared on the basis of the work done by them to apply those principles if the Governments should decide not to eliminate the bancos. (See U. S. Case App., pp. 1092-1097; see also Joint

^a Mariscal to Clayton, Sept. 27, 1897, U. S. Case App., 949.

Journals of Nov. 27, 1897, and June 14, 1898; also of date Apr. 10, 1903.) The Banco Elimination Treaty recommended in the Joint Journal of the Boundary Commission of January 15, 1895, was not consummated until November 14, 1905. Ten years was devoted to the study of the proposed treaty; the most exact topographical data was required of and supplied by the Engineers and the most precise history of the bancos to be eliminated was obtained.

In order to demonstrate the thoroughness with which the Government of Mexico was informed before committing itself to the approval of the Banco Treaty, it is only necessary to examine the diplomatic correspondence and the journals of the Boundary Commission leading up thereto. Therefore a more detailed examination can not fail to be instructive.

A survey was made of several typical bancos in the fall of 1894, and testimony was taken by the Commissioners. It seemed highly undesirable to apply existing treaties to these cases, i. e. run the boundary in the abandoned bed of the river around the bancos, so the Commissioners made certain recommendations to the two Governments for the elimination of the bancos from the provisions of Article I and II of the Treaty of 1884, as is shown in the Joint Journal of January 15, 1895, which is in part as follows:

The engineers having completed and presented to their Commissioners the verbal reports, maps, and plans of their work on the river as inscribed in the journal, the Joint Commission met at the office of the Mexican Commissioner at 10 a. m.

The Commission found the bancos so utterly different from what they had expected that, after long and deliberate consideration, they concluded that their process of formation, their form and constantly changing character, could not have been contemplated by the conventions creating the Treaties of 1884 and 1889, and they have both felt impelled to suggest separately to their Governments a reconsideration of Articles I and II of the Treaty of 1884, so far as those articles relate to these bancos, as said articles appear to clearly establish a banco as an avulsive change.

* * * * *

These bancos are typical of all the rest, not having been in anyway selected, but taken at random by the accident of the complainants. There are perhaps 40 or 45 other bancos of a similar character in this division, probably nearly equally distributed on the two banks of the river between Rio Grande City and the Gulf. They perhaps will have but an average of one or two hundred yards frontage on the river, but the length of boundary added by following the deepest channel in the bayou or old bed of the river will probably average 4 or 5 miles, thus increasing the boundary line several hundred miles, and instead of simplifying the question of boundary would confound the confusion already existing. These bancos are low, generally newly formed land, seldom occupied by any inhabitant, liable to overflow and do overflow almost every year.

* * * * *

After a careful consideration of all these questions, and our experience with the four bancos already surveyed, and an examination of many citizens who have still others to survey, we feel that it is our duty, before proceeding further, to present these facts for the consideration of our Governments, and suggest that they may wish to amend Articles I and II of the Treaty of 1884, so that any banco having less frontage on the river's current than it has depth from the river shall not be considered as an avulsive change as contemplated in the treaty, but in these cases the Commission be authorized to announce the transfer of jurisdiction to the country in which it is located, provision being made for the transfer of the evidence of titles to land from the local authority on the side from which it is transferred to the local authority on the side to which it is transferred. The inhabitants of the land, if there be any, to retain their citizenship in the country to which they belong if they so choose.

As Article VIII of the Treaty of 1889 provides that the judgment of the Joint Commission shall be considered binding upon both Governments, unless one of them shall disapprove it within one month, reckoning from the day on which it shall have been pronounced, and as this subject would probably occupy the two Governments for more than thirty days before coming to a decision, the Commissioners have considered it best not to pronounce their decision at present or until further instructed by their Governments after the Commissioners shall have explained verbally in detail the question submitted.

In order to testify the unanimity of our opinion in this matter, we have drawn up this joint statement, to which our signatures are attached, and which will be incorporated in the journals, a copy of which will be transmitted by each Commissioner to his Government.

Three of the four typical bancos referred to in the foregoing Journal had been formed prior to 1884, two of them long prior to that time. The survey and report, together with a memorandum and "probable decision" of the Commission with reference to these bancos was transmitted by the United States Commissioner to the Secretary of State. (See U. S. Case App., pp. 1101-1106.) Two copies of the special Report of the United States Commissioner on these "bancos" with draft of the decision in each case was on December 5, 1895, transmitted by the Secretary of State to the Mexican Minister, M. Romero. (See U. S. Case App., p. 913.)

Owing to the fact that Mexico deemed it necessary to have further and more detailed information on the subject before acting on the recommendation of the Commissioners the Joint Commission agreed in a Joint Journal of November 27, 1897, to the following procedure:

The Joint Commission met at the Hotel Hamilton at 2 p. m., for the consideration of the proposed continuous survey of the Rio Grande (Rio Bravo) from Rio Grande City, Texas, and Camargo, Tamaulipas, to its mouth at the Gulf of Mexico, to enable the two governments to finally consider the change in the treaty of 1884, suggested in the report

of the Joint Commission dated January 15th, 1895, eliminating the isolated bancos from the operation of said treaty.

* * * * *

This survey was started December 15, 1897, and completed March 30, 1898, and is shown on 54 sheets, covering 58 bancos.

On June 14, 1898, the Commission made the following Journal:

The Joint Commission met at the office of the American Commissioner at 10.30 A. M.

The Mexican Commissioner stated that after having carefully read the joint report of the Consulting Engineers in regard to the survey, which was requested in the journal of November 27th last to be made, of the lower Rio Grande from Rio Grande City to the Gulf, for the purpose of obtaining better and more definite information for the settlement of the important question regarding the amendment to Articles I and II of the Convention of 1884, referring to the elimination of the bancos from treaty stipulations, and having before him the engineers' map, which confirms and strengthens the reasons the Commissioners had for proposing to their governments in the journal of January 15, 1895, that the bancos be eliminated, he proposes that, for the reasons mentioned in the proposition of the Joint Commission made on the above-mentioned date (January 15, 1895), as well as for those contained in the recent report of the Consulting Engineers, that it be at once proposed to the governments to amend the articles mentioned for the following reasons, which are obtained in substance from the reports and documents already mentioned :

1. That Articles I and II of the Treaty can not have an exact application in determining the question of boundary when the phenomena known by the name of banco takes place, and which consists in the cut which the river capriciously makes in changing its course in the lower part of the river, eroding slowly and gradually the neck or peninsula situated between two bends of the channel, which characterize the course of the river in its lower part towards the Gulf of Mexico, making it so narrow that the least flood cuts it, through avulsion.

Therefore, the application of Articles I and II of the treaty can not be exactly applied to this kind of "cuts" which cause the formation of the bancos; "cuts" which are due to slow and gradual erosion, together with an avulsion, without being able to decide which of the two predominates, nor at what time it took place at each "banco." On account of all these reasons, then, all bancos should be eliminated from the Treaty of 1884. This includes all bancos, whatever may be their form or dimension, from Rio Grande City to the mouth of the river, which is the region where study has shown that these peculiar changes take place on account of the current of the river.

2. That in establishing the boundary in the center of the old bed of the river the line is unnecessarily lengthened, and the question of jurisdiction becomes complicated from the moment that a part of the boundary line is found on land and a part follows the course of the river. This certainly causes great difficulties.

3. That in this last supposition the expenses for erecting the monuments which would be necessary for marking the boundary line would be excessive and would not correspond to the value of the lands involved, without taking into account the necessity for locating new monuments after subsequent changes of the river.

To the reasons plainly expressed in the report of the consulting engineers, which clearly elucidates the conditions involved, must be added

the advantages which would accrue to both Governments from the fixing of the boundary in a constant and certain line throughout the entire length of the river, whatever may be its changes in the future.

Therefore the Mexican Commissioner requests that the opinion of the Joint Commission, recorded in the journal of January 15, 1895, be again submitted for the approval of both Governments, now that more copious information and extensive study have substantiated the reasons which the Joint Commission then had for formulating that opinion.

The Mexican Commissioner proposed that while waiting for the approval of these proceedings by the respective Governments the consulting engineers are requested to proceed with the making of the final map, in duplicate, on a scale of 1 in 5,000, showing 1-meter contours and using conventional symbols for the topography. This map should be made in sections, on sheets of Whatman's antiquarian hot-pressed paper, mounted on muslin, or other sheets of similar surface and size (31 inches by 53 inches). This will make each sheet cover a space 3,300 meters wide by 6,100 meters long. One copy should be made in Spanish and one in English, and all lettering be made large enough to be legible when reduced one-half.

Wherever bancos occur any topography which may be affected by their final disposition should be omitted or left in pencil until action is taken on these minutes. They are also requested to make key-map sheets on such scale as they may agree upon, but on the same sized paper and with lettering large enough to stand a reduction of one-half.

The United States Commissioner replied that he agreed in every particular with the suggestions of the Mexican Commissioner, and they then mutually joined in a recommendation to their respective Governments that the treaty be so amended as to conform to the recommendations of the consulting engineers, now approved by the Commissioners.

The Joint Commission then adjourned.

In response to two notes of the Secretary of State, dated April 21st and 28th, 1899, urging a decision as to the elimination or nonelimination of the bancos, Minister Mariscal on May 1, 1899, writes the following note to the American Chargé d'Affaires:

DEPARTMENT OF FOREIGN AFFAIRS,
Mexico, May 1, 1899.

MR. CHARGÉ D'AFFAIRES:

I had the honor to receive your notes of the 21st and 28th ultimo, and with the second a copy, elegantly bound, of the report of the proceedings of the International Boundary Commission, a present which I much appreciate. In both notes, under instructions from the Government which you represent, you recommend, with the urgency proper in the case, a definite decision as to the elimination or nonelimination of the bancos which, owing to natural causes, have been formed in that part of the Bravo between the points of affluence of the Rio San Juan and its mouth in the Gulf of Mexico, as graphically represented in the four sheets of the photographic copy.

I have laid our communication and all matters relating to the case before the President of the Republic, and by his direction I have the honor to inform you that Mexico, like the United States, is decidedly in favor of the elimination of the bancos, judging it to be the only way to avoid questions of sovereignty and jurisdiction. Under the old and accepted system which we have applied to the Bravo, that of using rivers

to define the frontier boundary, it must be accepted as an invariable basis that one bank belongs to one country and the bank opposite to the other. The actual boundary, where the bancos are situated, interferes with the application of this basis, and therefore nothing is better than to eliminate, granting that it is not only possible but easy, the elements which interfere with it.

This principle being accepted, it remains to adopt the form of applying it, and there can be no other form than that of a diplomatic convention. Documents with which you are perfectly familiar propose and prepare the way for it; they are: The Proceedings of the International Boundary Commission of January 15, 1895, of November 27, 1897, and of June 14, 1898, and the draft of the treaty submitted by the Hon. Mr. Olney to the representative of Mexico in Washington on February 29, 1896.

These documents are, however, open to a serious objection—the use of abstract terms and generic definitions, which to-morrow may be an inevitable source of vexatious ambiguities. To do away with them, considering the degree of advancement reached in hydrographic studies by the International Commission, it will be sufficient to utilize this study and give it the rank of an agreement made under a convention.

I have the honor, therefore, by direction of the Chief Magistrate, to propose to you that our Governments carry it into effect on the following bases, which you will please submit, if you think it proper, to your Government: Clear and exact reference to the topography, with designation by name of the bancos to be eliminated, and also to the articles of prior treaties which are in conflict with the principle of the elimination of bancos, and which, therefore, should be modified; foreseeing future changes in the course of the Bravo, and for a decision in view of them, to prorogue the International Commission for a prudent period. Lastly, the convention will have to establish rules relative to citizenship, property, and servitudes on the bancos in question, in order that these rights may not be affected by the change of sovereignty and jurisdiction.

I renew, etc.,

IGNO. MARISCAL.

Mr. FENTON MCCREERY, etc.

The draft of a treaty prepared by Mr. Olney mentioned by Mr. Mariscal was sent to the American Commissioner by the Secretary of State for an expression of his views. The American Commissioner returned the draft with certain amendments containing his suggestions in the matter.

No decision having been reached by the two Governments during the next four years, the American Commissioner obtained the consent of his department to publish the maps of the survey of 1897–98, and in this connection special attention is called to a note placed on the face of each map in accordance with the instructions of the Joint Journal of April 10, 1903, as follows:

The Joint Commission met at the office of the Mexican Commissioner at 10 a. m.

The United States Commissioner then stated that as the 54 sheets of maps, embracing the Rio Grande from Rio Grande City to the Gulf, authorized by the two Governments, the preparation of which was requested of the Joint Engineers in the Journals of November 27, 1897,

and June 14, 1898, have been fully completed for the past four years (38 by the United States section and 16 by the Mexican section), with the exception of the delineation of the boundary around the bancos or in the main channel in front of them, the alternate location depending on the decision of the two Governments on the question of elimination of bancos, submitted to them in the Joint Journal of January 15, 1895, and other more recent journals; and as these maps are practically useless in their present inconvenient form for reference either by the officials of the two Governments or for explanation and illustration to the interested citizens thereof, he suggests to the Mexican Commissioner that the incomplete portions of the sheets above referred to, having bancos thereon, be filled out showing an alternative boundary, as follows: On sheets showing bancos run a broken red line along the center of the river's normal channel and a dotted red line around the bancos as shown on the sketch map, also placing in red the number and name of the banco on it and the following note in red in a conspicuous position as near the title as possible:

This sheet incomplete pending decision regarding elimination of bancos; if eliminated, boundary will follow broken red line; if not, will follow center of old river bed as indicated by dotted red line;

and on sheets not showing bancos put red line in the center of the normal channel, with the following note thereon:

International Boundary in the center of the normal channel.

That the duplicate maps prepared by the United States section and those prepared by the Mexican section be signed by the members of the Joint Commission and duplicates be exchanged, and that the definite location of the boundary be announced by the Joint Commission after the two Governments shall have determined which of the alternate locations described in the maps and referred to in our previous Journals shall have been adopted by them.

The United States Commissioner then submitted a letter from the Secretary of State of his Government authorizing these proceedings.

To which the Mexican Commissioner replied that he was ready, after approval from his department, to put at the disposal of the United States Commissioner for publication as he desires the English copies in his possession of the maps of the lower river, in exchange for the Spanish copies of the United States section, and that he was also prepared, after approval from his department, to sign all the copies, Spanish and English, jointly with the United States Commissioner, with a proviso or note stating that the publication was made for the information of the people along the river, but that the maps are not entirely finished and the boundary is yet to be decided finally by the two Governments.

The Commission then adjourned to meet at the call of either Commissioner.

These maps, after placing the notes above mentioned, were duly signed by the Commissioners and engineers and approved by both Governments, as shown by the Joint Journal of July 1, 1903:

The Joint Commission met at the office of the Mexican Commissioner at 10 o'clock a. m.:

The joint engineers having reported the completion of the banco maps, as requested in the Joint Journal of April 10, 1903, approved by both Governments, the Commissioners and engineers proceeded to sign the 54 banco maps and the 3 index maps, one copy each in Spanish and

English, and each Commissioner thereupon delivered to the other a duplicate of each map for the use of their respective Governments.

The Commission then adjourned to meet at the call of either Commissioner.

The Treaty for the elimination of the bancos was signed March 20, 1905. The text is quoted in full for more convenient reference.

Whereas, for the purpose of obviating the difficulties arising from the application of Article V of the Treaty of Guadalupe-Hidalgo, dated February 2, 1848, and Article I of the Treaty of December 30, 1853, both concluded between the United States of America and Mexico—difficulties growing out of the frequent changes to which the beds of the Rio Grande and Colorado River are subject—there was signed in Washington on November 12, 1884, by the Plenipotentiaries of the United States and Mexico, a convention containing the following stipulations:

“ARTICLE I.—The dividing line shall forever be that described in the aforesaid Treaty and follow the center of the normal channel of the rivers named, notwithstanding any alterations in the banks or in the course of those rivers, provided that such alterations be effected by natural causes through the slow and gradual erosion and deposit of alluvium and not by the abandonment of an existing river bed and the opening of a new one.

“ARTICLE II.—Any other change, wrought by the force of the current, whether by the cutting of a new bed or when there is more than one channel by the deepening of another channel than that which marked the boundary at the time of the survey made under the aforesaid treaty, shall produce no change in the dividing line as fixed by the surveys of the International Boundary Commissions in 1852, but the line then fixed shall continue to follow the middle of the original channel bed, even though this should become wholly dry or be obstructed by deposits.”

Whereas as a result of the topographical labors of the Boundary Commission created by the Convention of March 1, 1889, it has been observed that there is a typical class of changes effected in the bed of the Rio Grande, in which, owing to slow and gradual erosion, coupled with avulsion, said river abandons its old channel and there are separated from it small portions of land known as “bancos” bounded by the said old bed, and which, according to the terms of Article II of the aforementioned Convention of 1884, remain subject to the dominion and jurisdiction of the country from which they have been separated;

Whereas said “bancos” are left at a distance from the new river bed, and, by reason of the successive deposits of alluvium, the old channel is becoming effaced, the land of said “bancos” becomes confused with the land of the “bancos” contiguous thereto, thus giving rise to difficulties and controversies, some of an international and others of a private character;

Whereas the labors of the International Boundary Commission, undertaken with the object of fixing the boundary line with reference to the “bancos,” have demonstrated that the application to these “bancos” of the principle established in Article II of the Convention of 1884 renders difficult the solution of the controversies mentioned, and, instead of simplifying, complicates the said boundary line between the two countries;

Therefore, the Governments of the United States of America and the United States of Mexico, being desirous to enter into a convention to establish more fitting rules for the solution of such difficulties, have appointed as their Plenipotentiaries—

That of the United States of America, Alvey A. Adee, Acting Secretary of State of the United States:

That of the United States of Mexico, its Ambassador Extraordinary and Plenipotentiary, Licenciado Don Manuel de Aspiroz;

Who, after exhibiting their full powers, found to be in good and due form, have agreed to the following articles:

ARTICLE I.

The fifty-eight (58) bancos surveyed and described in the report of the consulting engineers, dated May 30, 1898, to which reference is made in the record of proceedings of the International Boundary Commission, dated June 14, 1898, and which are drawn on fifty-four (54) maps on a scale of one to five thousand (1 to 5,000), and three index maps, signed by the Commissioners and by the Plenipotentiaries appointed by the convention, are hereby eliminated from the effects of Article II of the Treaty of November 12, 1884.

Within the part of the Rio Grande comprised between its mouth and its confluence with the San Juan River the boundary line between the two countries shall be the broken red line shown on the said maps—that is, it shall follow the deepest channel of the stream—and the dominion and jurisdiction of so many of the aforesaid fifty-eight (58) bancos as may remain on the right bank of the river shall pass to Mexico, and the dominion and jurisdiction of those of the said fifty-eight (58) bancos which may remain on the left bank shall pass to the United States of America.

ARTICLE II.

The International Commission shall, in the future, be guided by the principle of elimination of the bancos established in the foregoing article, with regard to the labors concerning the boundary line throughout that part of the Rio Grande and the Colorado River which serves as a boundary between the two nations. There are hereby excepted from this provision the portions of land segregated by the change in the bed of the said rivers having an area of over two hundred and fifty (250) hectares, or a population of over two hundred (200) souls, and which shall not be considered as bancos for the purposes of this treaty and shall not be eliminated, the old bed of the river remaining, therefore, the boundary in such cases.

ARTICLE III.

With regard to the bancos which may be formed in future, as well as to those already formed but which are not yet surveyed, the Boundary Commission shall proceed to the places where they have been formed, for the purpose of duly applying Articles I and II of the present convention, and the proper maps shall be prepared in which the changes that have occurred shall be shown, in a manner similar to that employed in the preparation of the maps of the aforementioned fifty-eight (58) bancos.

As regards these bancos, as well as those already formed but not surveyed, and those that may be formed in future, the Commission shall mark on the ground, with suitable monuments, the bed abandoned by the river, so that the boundaries of the bancos shall be clearly defined.

On all separated land on which the successive alluvium deposits have caused to disappear those parts of the abandoned channel which are adjacent to the river; each of the extremities of said channel shall be united by means of a straight line to the nearest part of the bank of the same river.

ARTICLE IV.

The citizens of either of the two contracting countries who, by virtue of the stipulations of this convention, shall in future be located on the land of the other may remain thereon or remove at any time to whatever place may suit them, and either keep the property, which they possess in said territory or dispose of it. Those who prefer to remain on the eliminated bancos may either preserve the title and rights of citizenship of the country to which the said bancos formerly belonged, or acquire the nationality of the country to which they will belong in the future.

Property of all kinds situated on the said bancos shall be inviolably respected, and its present owners, their heirs, and those who may subsequently acquire the property legally, shall enjoy as complete security with respect thereto as if it belonged to citizens of the country where it is situated.

ARTICLE V.

This convention shall be ratified by the two high contracting parties in accordance with their respective Constitutions, and the ratifications shall be exchanged at Washington as soon as possible.

In witness whereof, we, the undersigned, by virtue of our respective powers, have signed the present convention, both in the English and Spanish languages, and have thereunto affixed our seals.

Done in duplicate, at the City of Washington, this 20th day of March, one thousand nine hundred and five.

ALVEY A. ADEE, (SEAL.)
M. DE AZPIROZ. (SEAL.)

PROTOCOL OF SIGNATURE.

The Plenipotentiaries of the United States and Mexico who, on March 20, 1905, signed the treaty for the elimination of bancos in the Rio Grande, having omitted involuntarily to sign the maps mentioned in Article I thereof and which form a part of the said instrument, the undersigned Plenipotentiaries have met together this day and signed the above mentioned maps in conformity with the authority conferred upon them by their respective Governments.

In witness whereof they have signed the present Protocol of Signature and have affixed their seals thereto.

Done at Washington this fourteenth day of November one thousand nine hundred and five.

[SEAL.]
[SEAL.]

ALVEY A. ADEE
JOSE F. GODOY.

From the foregoing only one conclusion can be drawn: that both Mexico and the United States understood that the Treaty of 1884 applied to all these cases; those formed before the date of the treaty as well as those formed afterwards, and the banco treaty states that—

Whereas, as a result of the topographical labors of the Boundary Commission created by the Convention of March 1, 1889, it has been observed that there is a typical class of changes effected in the bed of the Rio Grande, in which, owing to the slow and gradual erosion, coupled with avulsion, said river abandons its old channel and there are separated

from it small portions of land known as "Bancos" bounded by the said old bed, and which, according to the terms of Article II of the aforementioned Convention of 1884, remain subject to the dominion and jurisdiction of the country from which they have been separated:

And further, in Article I of the treaty it is stated that the bancos shown on the maps and mentioned in the proceedings of the Commission "are hereby eliminated from the effects of Article II of the Treaty of November 12, 1884."

Of course it goes without saying, especially in the case of the bancos formed prior to 1884, that unless it was considered that the Treaty of 1884 applied it would have been unnecessary to have eliminated them from the provisions of that treaty.

Of the 58 bancos eliminated under the Treaty of 1905, the following, thirty-six, were formed prior to 1884, as indicated by the following table:

List of bancos formed prior to 1884, and eliminated by treaty of 1905.

No.	Name.	Cut from United States.	Cut from Mexico.	Page No. in Proceedings of International Boundary Commission.	Page No. in Elimination of Bancos Report.	Area in 1909.		Area in 1898.		Date of cutoff given in Engineer's Report, Proceedings of International Boundary Commission.	
						Acres.	Hectares.	Acres.	Hectares.		
3	Longoreno		1876	4	33	138.1	55.9	101	41	Page.	Date.
4 ^a	Fernandez	1860		252	35	224.1	90.7				
6	Phillips		1875	250	37	111.4	45.1	109	44		
7	Tahuachalito		1861	248	38	178.9	72.4	174	72		
8	La Isla	1851 ^a		247	39	157.9	63.9	191	77		
10	Benanides		1874	246	41	130.2	52.7	137	55		
11	Rafael Garcia		1863	246	42	28.2	11.4	105	43		
13	Capote		1864	245	44	137.6	55.7	135	55		
15	Comtee	1880		244	46	79.6	32.2	144	58		
17	Maniero	1869		243-244	48	207.6	84.0	213	86	201	1869
18	Las Sierritas		1874	243	49	134.4	54.4	151	61	201	1874
20	Las Tranquitas		1855	243	51	129.5	52.4	212	86	201	1855
23	Soliseno		1859	242	54	221.6	89.7	232	94		
24	Villitas		1876	241	55	76.8	31.1	74	30		
25	Palma		1872	241	56	198.2	80.2	200	81		
26	El Zurrón		1860	240	57	238.2	96.4	300	121		
27	La Bolsa		1860	240	58	192.5	77.9	190	77		
28	Cantu		1862	240	59	41.3	16.7	30	12		
29	Villarreal		1857	239	60	153.2	62.0	147	59		
30	Santa Margarita		1880	238	61	283.2	114.6	277	112		
33	Arguelles	1880		237	64	336.8	136.3	376	152		
34	Santa Juanita		1860 ^a	237	65	40.5	16.4	60	24		
35	Eurestes		1882	336	66	93.2	37.7	136	55		
38	Santa Rita	1882		334	69	155.7	63.0	180	73		
39	Longoria		1872	334	70	132.7	53.7	135	55		
43	Santa Cruz		1881 ^a	229	74	338.5	137.0	338	137		
44	Grangeno		1870	226	75	207.3	83.9	159	64		
45	Anzaldúa		1876	225	76	43.0	17.4	66	27		
46	Maria Inez ^b		1880	225	77	55.8	22.6	64	26		
47	Lomitas	1884 ^a		225	78	16.6	6.7	49	20		
48	King		1869	223-224	79	212.0	85.8	255	103		
49	Ojo de Agua	1885 ^a		223	80	68.2	27.5	84	34		
51	Garza	1862		221	81	160.6	65.0	184	75		
52	Pedro Vela		1864	221	82	94.9	38.4	116	47		
53	Antonio Vela		1865	220	83	151.7	61.4	165	67		
55	Santo Domingo		1866	214	84	302.7	122.5	311	126	200	1866

^a About.

^b Ynez.

Report of consulting engineers on survey of 1897-98, giving tabular statements of bancos, pages 192-204, Proceedings of International Boundary Commission.

Report of consulting engineers on survey of 1908-9 on pages 17-26, Elimination of Bancos Report, first series, Nos. 1 to 58.

The thirty-six bancos above described, formed prior to 1884, together with twenty-two formed subsequent to that date, were the inspiration of the Treaty of 1905. The maps thereof and the detailed Report of the Consulting Engineers setting forth the origin and history of the bancos were before the plenipotentiaries when they negotiated and signed the Treaty. The map of each banco was signed by them. It is respectfully submitted that the elimination of each of the thirty-six bancos formed prior to 1884 was a several adjudication that the Convention of 1884 was retroactive.

Nor, finally, has the attitude of the International Boundary Commission in applying the interpretation of the Banco Treaty of 1905 to the Boundary Treaty of 1884, undergone any change since the elimination of the original fifty-eight bancos, nor even since the presentation by Mexico of the "fixed line" theory in January, 1910.

Thus we find in the Joint Journal of May 14, 1910 that "the Commission took for consideration the joint report of the Consulting Engineers of May 4, 1910, with maps covering the work of the survey of twenty-two bancos on the lower Rio Grande, twenty-one of which were formed subsequent to the survey of 1897-8 and one (Tortuga) previous to that date." ^a

In the accompanying Report of the Consulting Engineers is set forth at length the history and topography of the Tortuga Banco in which it is succinctly stated that this banco was cut off "*somewhere about 1860.*" ^b

This action of the Commission received the formal approval of the two Governments. ^b

Can it be seriously contended that during the long course of diplomatic correspondence from the recommendation contained in the Joint Journal of January 15, 1895, and even up to the action of the two Governments concerning the Tortuga Banco in May, 1910, that the Mexican authorities were not aware of the retroactive construction which they were thus solemnly placing upon the Treaty of 1884.

The distinguished learning and ability of Mexico's representatives, as well as the diligence with which they have at all times defended the interests of their country, precludes even for a moment such a conclusion.

^a U. S. Case App., p. 1112.

^b U. S. Case App., p. 1121.

ACCRETION AND AVULSION.

THE LAND IN DISPUTE WAS FORMED BY ACCRETION AND BELONGS
TO THE UNITED STATES TERRITORY.

The Case and Countercase of Mexico appear to base Mexico's claim to the territory solely on the ground that the line of the middle of the channel of the Rio Grande as that line ran in 1852 was a fixed and invariable boundary line between the two countries. Since, however, the Government of Mexico has not expressly and categorically abandoned the contention upon which it based its claim to the Chamizal tract^a at the former trial, namely, the contention that the tract was formed by avulsion, and since, moreover, within the last few days a Mexican engineer, under the instructions of the Mexican boundary commissioner and by arrangement with the boundary commissioner on behalf of the United States, has been engaged in sinking a series of transverse pits across the Chamizal tract under instructions informally communicated to the engineer on behalf of the United States, which instructions look toward the securing of evidence of the formation of the tract through avulsion, and in view of the fact that under the liberal practice which has hitherto ordinarily obtained before international commissions with regard to pleading and procedure Mexico may even yet be permitted by the commission to revert to her original theory of avulsion, it is deemed best to consider in this argument to a limited extent the manner of the formation of the Chamizal tract and the law applicable thereto.

It has been already herein demonstrated by a recitation not only of the circumstances leading up to and surrounding the convention of November 12, 1884, but also by the acts of the respective parties thereafter—both through their high officials and through the actual interpretation of the convention by the International Boundary Commission in its decision of the various changes in the Rio Grande from New Mexico to its mouth—that the treaty of 1884 is an agreement to define and interpret the language of the treaties of 1848 and of 1853, so far as those treaties fix the middle of

^a See U. S. Countercase, p. 6-9.

the channel of the Rio Grande and the Rio Colorado as boundaries between the two countries. Indeed, the language of the preamble of the treaty will permit no other construction. (U. S. Case, App., p. 67.)

Yet, whether the matter be decided by the law as laid down in the convention of 1884, or by the law of nations as defined by the decisions and opinions of courts and of distinguished jurists and text-writers from all countries of the world, it will be demonstrated that the disputed land was formed in such a way as to make it the territory of the United States of America.

Article I of the boundary convention of 1884 provides that the dividing line shall forever follow the center of the normal channels of the rivers named, notwithstanding any alterations in the *banks* or in the *course*^a of those rivers, provided that such alterations be effected (a) by natural causes, (b) through the slow and gradual erosion and deposit of alluvium, and (c) not by the abandonment of an existing river bed and the opening of a new one.

It is apparent that the treaty of 1884 intended to lay down as "rules for the determination of such questions" as might arise—

- (1) That the dividing line shall *forever* follow the *normal* river channel so far as possible.
- (2) That alterations in the *banks* and in the *course* of the river should occur without changing the natural fluvial boundary.
- (3) That such alterations must be from causes *natural* to that river.
- (4) That such alterations must occur from slow and gradual erosion and deposit of alluvium; and
- (5) Not by the *abandonment* of an existing river bed and the *opening* of a new one.

The first matter for consideration is to understand somewhat the nature and condition of the Rio Grande and of its valley, so that a proper interpretation of the words of the treaty may be made wherein it states that the river shall follow the center of the *normal*^a channel forever, even though alterations in the banks or in the course of the river occur by *natural*^a causes.

The best description in the printed cases of the river near El Paso and Juarez is probably the language of O. H. Ernst, major of engineers, in a report made to the Secretary of State of the

^a Italics ours.

United States December 12, 1888, at the time the two Governments were diplomatically considering the nature of the jetties which were being constructed along the river front at Juarez opposite El Paso. This report is printed on page 758 of the Appendix to the United States Case and the paragraph referred to is as follows:

Leaving a rocky gorge just above El Paso the Rio Grande issues into an *alluvial* plain some 5 or 6 miles in width, through which it flows in a bed of its own formation. The banks and bottom are of light earth and sand easily moved by the currents. The river is a silt-bearing stream, carrying at times an excessively large proportion of solid matter. At the lowest stage the water ceases to flow and except in detached pools the bed becomes entirely dry. During the spring freshets the water sometimes rises to a height of from 9 to 10 feet above the lowest, and flows with a rapid current heavily charged with sediment. At such times it possesses great building as well as destructive power. Between these two extremes there are at different seasons all degrees of volume and velocity. The size and character of the stream are ever varying, and its requirements as to form and dimensions of bed vary equally. The river's work of altering its bed to suit the necessities of the moment is never-ending. The bed as it happens to exist now is the final resultant of all efforts of the stream, some of which have neutralized and some have aided each other, but the bed is not fixed. It is shifting from one position to another, altering its course, eroding one bank and building up the opposite one, forming islands and bars, and then destroying them. The result of the natural changes is most noticeable in a bend where the erosion of the concave shore is sometimes continuous for many years, as appears to have been the case at El Paso. (U. S. Case App., p. 759.)

Further on in his report Major Ernst makes the following statement:

It may be pertinent to add that the changes which have occurred in the Rio Grande at El Paso are perfectly natural to an alluvial stream, and that similar changes have doubtless occurred throughout its course below. It is highly probable that at the date of the Convention of 1884 there were very few points in common between the location of the river at that time and its location at the time of the survey of 1855. (U. S. Case App., p. 768.)

It will be noticed that in a report dated March 25, 1886, by Don Ignacio Garfias, the engineer in charge of the construction of the jetties at Juarez, given on page 769 Appendix United States Case, Señor Garfias, at page 771, uses the following language:

The curve of the river in front of Paso del Norte presents its convex side toward the Mexican bank, and from a comparison of the surveys of the commission of 1852 with one made by me, it results, that the river has changed its course toward the south, 1,735 meters. Without the necessity for the inspection of maps, the aspect of the soil on both sides of the river proves the invasion of the right bank; for this side is covered with vegetable earth, which waters never deposit, and the left bank dis-

plays only sand, and that character of soil produced only by alluvion. I think therefore that I have sufficiently demonstrated the loss of territory suffered by the Mexican side.

Señor Garfias also, at page 777, asserts that on the American side the land has been added to *day by day by alluvion.*^a

On May 22, 1888, the Mexican secretary of state, Mr. Mariscal, in a letter to Mr. Bragg, United States minister, wrote that the chief engineer in charge of the hydraulic works on the river had made a report to him. Mr. Mariscal states:

That report establishes the fact that the wing-dams referred to by your legation, and the construction of which was for the sole purpose of protecting the right bank of that river against the force of the current, have not, up to the present, caused any damage to the left bank of the same; also *that the changes produced upon both river-banks were produced*^a prior to the construction of the said wing-dams and were due alone to the *corrosion natural to soft lands.*^a (U. S. Case App., p. 709.)

In the year 1897 the International Water Boundary Commission were instructed to examine and ascertain the precise spot where the seizure of some cattle belonging to J. N. Ornelus and other Mexicans took place, said cattle having been seized some miles below El Paso by the officers of the customhouse at El Paso, Tex., and where the men having charge of the cattle were arrested. This instruction was for the purpose of ascertaining whether the spot was in Mexico or in the United States.

On May 8, 1897, the Commissioners held a joint meeting and in the journal of that meeting appears the following entry (page 942, Volume II, Appendix, U. S. Case):

The Commission deems it its duty to describe, for the information of the superior authorities, the unusual manner in which the Rio Grande runs, which can with difficulty be appreciated by authorities not familiar therewith. The Rio Grande runs through its alluvial valleys in a bed which is from four hundred to a thousand yards wide, and whose bottom, which is formed of fine loose sand, is constantly moved by the force of the current; so that even an engineer, without instruments to measure the depth of the water when the bed of the river is full, or to ascertain the level of its surface when it is dry, cannot determine where the boundary line is, within hundreds of yards. After several years, when, the river being full, the annual freshets have materially changed its bed owing to the sand moved by the force of the current, and when, it afterwards being dry, the wind moves the sand from the bed, it is wholly impossible to determine, scientifically, within several hundred yards, where the boundary line was at the time of the confiscation of the cattle and the arrest of the man on the 15th day of September, 1891.

On May 3, 1897, Mr. W. W. Follett, consulting engineer with the American Commissioner, and Mr. E. Corella, consulting engi-

^aItalics ours.

neer with the Mexican Commissioner, made and signed a joint report accompanied by a topographical sketch of the ford in the river between the villages of Isleta and Zaragoza, where the cattle had been seized, being a few miles below El Paso. The closing paragraph of this report (Appendix U. S. Case, p. 945) is as follows:

Since 1852 the river may have covered, and probably has, at various times successively covered all the points of the surface between the borders mentioned; but, as these movements have been due to erosion and deposit, the boundary line has followed the same movements, as contained in the channel itself.

A most excellent and full description of the river bed and valley at El Paso and its manner of changes is shown in the report of Consulting Engineer W. W. Follett, dated March 30, 1911, and printed in Appendix U. S. Countercase, page 218.

By consulting map No. 4, accompanying the United States Case, being the map prepared from a survey in January, 1896, by Mr. F. O. Dabney, assisted by P. O. Cunningham and W. W. Follett, there will readily be seen the progress which has been made toward the south by the river from 1827 to 1896, the channel for 1896 between El Paso and Juarez being approximately as it is now. All of the testimony taken before the International Boundary Commission, together with all reports of engineers and all other evidence whatever, show that the advance of the land toward the south, as the channel has moved southward, has been formed by accretion. There was not produced any evidence whatever before the Commission to sustain the allegation in the petition of Pedro I. Garcia, which was the basis of the Mexican claim before the International Boundary Commission, that any avulsive change in the course of the river occurred at El Paso in 1873 as set forth in his petition, or any avulsion at any other date.

In 1827 the land north of the river channel of 1827 was owned by Juan Ma. Ponce de Leon. (See petition of Ponce to the president of the district, dated Sept. 21, 1827, pp. 11-15, Appendix U. S. Countercase.)

In 1852 his land extended to the river, then located as shown on the said map considerably to the south of its location in 1827, and subsequent to that Ponce and his heirs received from the governor of the State of Texas under date of May 4, 1887, a patent for the land reaching to the east bank of the Rio Grande. This was in confirmation of the grant to him of the land by an act of the Legis-

lature of the State of Texas relinquishing all her right and interest in El Rancho de Ponce, known as the town of Franklin, approved February 11, 1858. (Appendix U. S. Countercase, pp. 138-143.)

Even while the surveys were being made by the engineers of the Boundary Commission in 1852, the accretion to the American side was then steadily going on. Mexican sheet No. 29, which was a plan made in 1852 of the Rio Grande by Engineer Jose Salazar, differed from United States sheet No. 29, which was made six months later. (See U. S. Case Portfolio maps 6 and 7.) In those six months the land had advanced considerably to the south, the greatest width of such advance probably being 150 yards. The original United States sheet No. 29 did not show the signatures of the Commissioners, and an entry thereon made at the time was as follows:

This map has been compared with the corresponding map of the Mexican Commission, and is found to represent the true boundary. The two maps agree except in the bed of the river, which circumstance is the consequence of the two surveys being made at different periods, six months apart, during which time the river changed its bed, as it is constantly doing, but always within narrow limits. (Mexican Case, p. 2. U. S. Case App., p. 109.)

A survey was made on March 25, 1853, by W. L. Diffendorffer, assistant surveyor, El Paso district, which was a survey of the Spanish Ponce grant and covered almost the entire front of the river. (See U. S. Case App. p. 143.) It appears by that survey that the north bank of the river had moved south since 1852 some 69 feet.

Another survey was made of the same land February 8, 1859, by Gen. Anson Mills, then deputy surveyor, El Paso and Presidio district. (See plat and field notes U. S. Case App. p. 144.) This survey shows that the north bank of the river had receded toward Mexico, since the prior survey in 1852, 232 feet.

Another survey was made covering a tract along the river in the upper part of the Ponce grant on November 18, 1872, by Joseph W. Tays, surveyor of El Paso County. (See plat and field notes of this survey, U. S. Case App. p. 146.) This survey showed that the north bank of the river had moved toward Mexico to a considerable extent. (See statement of United States Commissioner Mills as printed with U. S. Case App. p. 139.)

Consulting Engineer Emiliano Corella, in his report made May 26, 1896, gives a tabulated list of the advances made from 1827 to 1889, inclusive, by periods, and states that the average annual advance opposite the bridges during the period from 1827 to 1889 was 20.25 meters. (U. S. Case App., p. 173.)

Whatever has been formed to the north of the river bank has been by accretion. There is not in the entire testimony any evidence whatever to show that there ever was an avulsion in the river at the place in controversy. The high banks on the Mexican side have always prevented an avulsion and there has never been, using the language of the convention of 1884, an abandonment of an existing river bed and the opening of a new one.

The land has formed by the deposit of alluvium upon the old river bed to the north of the river, as the river has gnawed away the land on the southern bank.

It is without question that the alluvium which has been deposited on the tract in dispute must from the necessity of the case have come from erosion of the banks of the river, not on the other side at Juarez but higher up the river toward New Mexico. The testimony taken before the Boundary Commission showed that all the soil which was washed away on the Mexican side of the river at Juarez passed down the stream to form accretions below. It is therefore clear that the land which has formed by accretion to the El Paso side has not been the same land which existed before the erosion on the other side. All of it has had to go through a period of transformation by passing under the river and remaining as a part of the river bed or bottom until such time as the south banks had by erosion gone sufficiently southward to pass the substratum of the land to the north bank, and leave it in a position to receive the alluvium which might be washed down from above. Soil thus transposed through the bed of the river undoubtedly took several years to become alluvial land on the other side, and for a part of that time at least it would remain under water on the Mexican side of the middle of the stream. When it formed again on the American side long after the former Mexican owner lost it it would be different land from the land that formerly was located on the Mexican side and would be in part composed of soil that probably came from many miles up the river.

There have been built at various times on the Mexican side of the river jetties, or other defensive works, to resist the force of the stream against the banks.

It appears from the testimony in the case that for a period of years prior to 1864 there had been jetties constructed on the Mexican side for the purpose of resisting the force of the current and preventing erosion and destruction of the bank. (See the testimony of Jose M. Flores at bottom of p. 122, Appendix U. S. Case; of Ynocent Ochoa, bottom of p. 131; of Mariano Samaniego, p. 152.)

Mr. Samaniego also testified that in the year 1872 there were constructed some other defensive works. (Appendix U. S. Case, p. 153.)

Jetties on a more extensive scale were constructed by the Mexican Government along the river front at Juarez, beginning about 1885. Reference to these jetties or wing dams is made in the diplomatic correspondence between the two Governments beginning with the letter of Hon. T. F. Bayard, Secretary of State, to Thomas B. Connery, minister to Mexico (p. 704, Appendix U. S. Case), and ending in the report of Engineer I. Garfias on page 797.

The building of the jetties in 1885 and the years following has had the effect of stopping substantially the progress of the south bank of the river into the Mexican territory.

From all the testimony taken by the Commission, as well as from the reports of the engineers, it is established that the bank on the south side of the river between El Paso and Juarez has always been higher than the flow of the river even in those parts of the year when the river is full of water and at the same time has overflowed extensively on the American side. The testimony of the engineers, as well as that of the other witnesses, seems to establish that at a point some feet below the top of the ground on the Mexican bank is a thick layer or stratum of fine sand. A portion of the year there is little or no water in the channel of the river, and when the water rises so as to spread across the river bottom it works up to a point where it washes against and erodes the fine sand. It gnaws this sand out for a considerable distance under the soil above, and when it has eaten a sufficient distance under the banks, the soil above splits and falls into the water and is carried down the stream by the force of the current. The soil which falls may be in larger or smaller portions, but it falls because of the erosion of the sand underneath it. The

testimony of all the witnesses agrees that all parts of the soil precipitated into the stream dissolved and settled somewhere down the river and formed accretion land on one side or the other, which would not be noticed until the waters of the stream had abated.

The high water or floods in the river occur once or twice annually at such portions of the year as the waters are let free from the mountains in New Mexico or Colorado, either by the melting snow or otherwise, the water not being held up as it is in countries where the mountains are covered with woodland or where there is sufficient surface vegetation to retain the rain or melting snow and permit them to flow off gradually. The manner of the washing away of the Mexican banks is stated quite clearly by Jose M. Flores on pages 121, 122, U. S. Case Appendix, as follows:

Q. You speak of the river changing. How did it make these different changes you speak of?—A. As I understand it, it was by corrosion; in time of high water it changed by corrosion.

Q. Were these changes gradual; that is, every year, more or less?—A. Some years it had no effect. There was not enough water to make a change, and some years it would change considerably, according to the stage of the water.

Q. Did you ever know the river to abandon its bed and break out a new one through the lands in Mexico at this point?—A. No, sir.

Q. These changes, then, were all made by the tearing away of the Mexican bank, and the depositing on the United States bank of alluvium?—A. Yes, sir.

Q. Which bank of the river was the highest?—A. Always the Mexican.

Q. Did you ever know the Mexican bank to overflow in time of high water?—A. No, sir.

Q. Did the United States bank overflow in time of high water?—A. Yes, sir.

Q. When these high waters receded from the United States bank, was there evidence of increase of that bank by deposits of sand and alluvium?—A. Yes, sir. As the river moved toward Mexico it was leaving land in the United States.

Q. In the changes of the river that were made in the way you have described, did you ever know land that you had seen prior to the flood on the Mexican side to appear on the American side with anything to distinguish it; trees, houses, etc.?—A. No, there never was left anything that I could recognize as the original land.

Q. While these sand bars were forming under water on the United States side, could you see the operation with the naked eye; could you see them forming?—A. No, sir; you can not see them forming.

Q. They were only visible after the water had disappeared?—A. Yes, sir.

Q. About how wide was the average width of the river, from bank to bank, at the ford and ferry during these many changes in all this period?—A. The river did not leave any bank on the American side, and spread as the water rose.

Q. When the violence of the current destroyed the lands on the Mexican side, and precipitated the earth into the river, what became of this earth?—A. It went down into the water; I do not know where.

Q. Did you ever know any sudden change of the principal part of the current of the river outside the Mexican bank to the south?—A. No, sir.

* * * * *

Q. Please describe the manner of the tearing away of the Mexican bank by the current when these changes were taking place?—A. The current carried the sand from the bank and cut in under and then these pieces fell into the water. If the bank was very high it took larger pieces; say two yards, never more than three yards wide, and where the banks were low, it took smaller pieces.

Another witness, Samuel Shutz, testified, page 124, Appendix, U. S. Case, as follows:

Q. Where was the deepest channel in the river generally?—A. Closest to the Mexican side.

Q. Please describe how the Mexican bank was destroyed by the violence of the water.—A. The best illustration I can give is to consider a lot of laborers working on a sand bank and undermining by picks and shovels, etc., enough gravel or sand to make the upper bank too heavy and give away and fall into the river.

Q. You have often seen these banks falling into the river, have you not?—A. Yes, sir.

Q. What became of them?—A. Washed away; the best that I could see.

* * * * *

Q. When the United States bank was overflowed, the water covering it was comparatively still, was it not?—A. Yes, sir.

Q. And during the flood deposited a great deal of alluvium?—A. To the best of my knowledge, yes, sir.

Q. In this way the sand bars which were formerly drifting sand have been somewhat covered up by the many floods, have they not?—A. Yes, sir.

Q. Then again the drifting sand from the northwest wind has deposited a great deal of earth on top of these former sand bars, has it not?—A. The sand has a natural drift in certain places where it deposits.

Mr. Ynocente Ochoa testified, page 130, Appendix, U. S. Case, as follows:

Q. About how far did these banks stand above the surface of the water?—A. In some places the bank was probably half a yard; in other places they were not over three yards.

Q. What became of these pieces of earth when they fell into the river?—A. It is very hard for me to say or explain. It went into the water. The bank contains two kinds of earth, black clay and sand. I suppose both were carried away by the water.

Q. For all you know, they were carried down the river, possibly a mile or 10 miles, their particles lodging on either bank?—A. I can not say.

Q. You say the bank was made up of two kinds of soil, clay and sand. Which was above, the clay or sand?—A. The clay; the sand is always on the bottom of the bank of this river.

Q. Is it quicksand?—A. I do not know what you call quicksand. It is a pure white sand.

Q. This sand is first eaten out from under the clay by the current, causing the clay to fall in, is it not?—A. The water excavates the sand from under the clay and then the clay falls in.

Q. About how deep is the water generally next to the bank when it is eating out the sand?—A. I am unable to say.

Mr. E. Provencio, pages 135-136 U. S. Case Appendix, testified as follows:

Q. Please describe the destruction of the bank on the Mexican side that you spoke of in your former testimony. Describe the size of the pieces of earth that you saw fall into the river?—A. When the river made the alarming change it carried away pieces of earth, 1 yard, 2 yards, etc., constantly, in intervals of a few minutes. At the time of these changes the people would be standing on the banks watching a piece going down, and somebody would call look out, there is more going to fall, and they would have to jump back to keep from falling into the river.

Q. In this way the river tore off all the earth from the fields, did it not?—A. Yes, sir.

Q. About how deep did it cut down in tearing it away?—A. As the river made the curve, of course the volume of water was then deeper. When the river was washing away the land, which was composed of two kinds of earth, sand and, on top, clay, the water would wash the sand easily and then the weight of the clay, being 1 or 2 yards deep in places, would cause it to fall in. Under the clay was all sand, and I do not know how deep it was. The current was very deep.

The witnesses who testified in regard to the change in the river since 1852 stated as follows:

Jesus Serna noticed change in the river from 1852, first noticeable change in 1854 when there was a large flood; also one in 1864. (U. S. Case App., p. 117.)

Ynocente Ochoa (U. S. Case App., p. 117) knew the river from 1857 and from that year to 1868 knew of several changes in the river; from 1858 to 1860 there were some small changes, the largest in 1864 and slight changes from 1864 to 1868; it has made small changes from 1868 to date of testifying (1896); each change was slight in itself.

E. Provencio (U. S. Case App., p. 119) noticed changes in the river from 1860 to 1896; first noticeable change in 1864; very slight changes have taken place each year since 1864.

José M. Flores (U. S. Case App., p. 120). Some years there were no changes; there was not water enough to make a change and some years it would change considerably, according to the stage of the water.

Samuel Schutz (U. S. Case App., p. 123) went to El Paso to live in 1859. Small changes in the river from 1859 and each year since; large flood in 1864 and undermined the banks on Mexican side more than in any previous year since he lived there.

Joseph Magoffin (U. S. Case App., p. 126) knew river from 1856 to 1862 and since 1868; the river was always trying to work into Mexico; its natural course is that way. The deposits that were made on the northern side were all under water until the river fell.

From what has been stated above it seems to be clear that there has been at no time an abandonment of an existing river bed and the opening of a new one; that all the alterations in the banks and course of the river have been effected by causes which are natural to the Rio Grande; that the alterations have been through the slow and gradual erosion and deposit of alluvium and that all the requirements specified in Article I of the treaty of 1884 have been met at all times, so that the dividing line has constantly followed the center of the normal channel of the river.

The treaty-making powers in drawing the treaty of 1884 in order that there should be no mistake as to what is meant by the language of Article I of the convention of 1884 in laying down rules for determining when the dividing line should follow the center of the normal channel, also gave by Article II the definition of the requirements necessary in order that the river could change its location and leave the dividing line behind in its previous position. Article II provides that the change wrought by the force of the current which occasioned the cutting of a new bed or, when there was more than one channel, the deepening of another channel than that marked by the Boundary Commission, should cause the old dividing line to remain.

It is clear from all the evidence in the case that there has not been a cutting of a new bed at any time in the waters between El Paso and Juarez, nor has there been more than one channel, and in consequence the dividing line has moved from time to time as the alterations in the river have occurred. The consequence is that the dividing line has always moved as the channel of the river has moved sidewise.

If it should be argued by the Mexican agent and counsel that the breaking of the banks on the Mexican side caused by the

eroding and washing out of the sand below the superstructure of the bank constituted something different from slow and gradual erosion, and that therefore the boundary line did not move but remained where it was fixed by the commissioners under the treaty of 1848, then it is answered—

(1) That, considering the nature of the river, the alterations were effected “by natural causes through the slow and gradual erosion and deposit of alluvium,” and that this fact is demonstrated by the addition, at the end of Article I of the treaty of 1884, of the words “and not by the abandonment of an existing river bed and the opening of a new one.” It is clearly the intent of Article I that, in order that the boundary line should not “follow the center of the normal channel of the river,” there should be an abandonment of the river bed and the opening of a new one.

(2) That Article II of the treaty of 1884 emphasizes that the reasoning set forth in the last paragraph is correct, because in Article II it is provided that in order that the dividing line should not change by alterations in the river or by the force of the current there must be a new bed cut or the deepening of a different channel where more than one existed than the one which had been fixed as the boundary line.

(3) That the rules laid down by the convention of 1884 for the interpretation or determination of such questions as arose concerning the boundary as fixed by the treaty of Guadalupe Hidalgo was an expression of the doctrine laid down by Attorney General Caleb Cushing in his opinion rendered November 11, 1856, and found on page 559 of the Appendix to the United States Case. Indeed, it was so stated by the President of the United States in December, 1884. (See U. S. Case App., p. 1134.)

The opinion of Mr. Cushing is reported in volume 13 of the Attorney General's Opinions, page 175. In that opinion (p. 562, Appendix, U. S. Case) Mr. Cushing quotes from works on international law of the highest authority in Spain and Spanish America to substantiate the doctrine which he lays down upon the subject of the change of the dividing line between the two nations by alterations in the channel of the stream. The authorities are Don Antonio Riquelme, Don Andres Bello, and Don Jose Maria de Pando, and also Almeda. This opinion was rendered in 1856 on a proposed report of the Boundary Commissioners

and related to changes in the river near El Paso. The objection to the opinion on the part of the agent for the United States of Mexico as set forth in Mexico's Case, page 44, on the ground that Attorney General Cushing did not have before him the full facts of the case is not well founded, as has been considered heretofore in this brief.

The opinion of Attorney General Cushing was submitted to the Mexican minister at Washington, Hon. Matias Romero, in answer to a complaint which had come through the department of foreign affairs of Mexico and had been transmitted by Jefe Politico at Juarez (then El Paso del Norte). The complaint at that time, namely, in 1866, was that the river had taken the soil from the Mexican side of the river and left it on the left front of the river at Franklin, the old name for El Paso, Tex., and at San Elesario there had been a change in the river which had left the woods on that side of the river. The opinion was submitted to Minister Romero to demonstrate that the change at Juarez was a change by erosion and accretion and that the change at San Elesario was by avulsion and that therefore both lands belonged to the territory of the United States. Minister Romero, in his reply (found on pp. 565-567 Appendix, U. S. Case), virtually adopts the opinion as applicable to the river.

So that, whether the law applicable to the case is the law of the treaty of 1884 or international law as expounded by the opinion of Attorney General Cushing which, as stated, has been submitted to and approved by the minister at Washington from Mexico, and is sustained by the doctrine of jurists and writers of all countries, some of whom will be hereinafter referred to, it is evident that the formation of the land at El Paso has been such as to cause it to belong to and become a part of the territory of the United States of America.

Although the matter of the effect upon the river banks in a torrential river such as the Rio Grande has not been referred to in most of the authorities, yet in the case of *Nebraska v. Iowa* (143 U. S., 359), which related to the violent force of the waters on the banks of the Missouri River, the Supreme Court of the United States has decided that the tearing away of the banks similarly to that shown on the river front at Juarez constitutes an erosion and that the dividing line follows the change in the

channel of the stream. A part of the opinion of the Supreme Court is as follows:

The Missouri River is a winding stream, coursing through a valley of varying width, the substratum of whose soil, a deposit of distant centuries, is largely of quicksand. In building the bridge of the Union Pacific Railway Co. across the Missouri River, in the vicinity of the tracts in controversy the builders went down to the solid rock, 65 feet below the surface, and there found a pine log a foot and a half in diameter—of course, a deposit made in the long ago. The current is rapid, far above the average of ordinary rivers; and by reason of the snows in the mountains there are two well-known rises in the volume of its waters, known as the April and June rises. The large volume of water pouring down at the time of these rises, with the rapidity of its current, has great and rapid action upon the loose soil of its banks. Whenever it impinges with direct attack upon the bank at a bend of the stream, and that bank is of the loose sand obtaining in the valley of the Missouri, it is not strange that the abrasion and washing away is rapid and great. Frequently, where above the loose substratum of sand there is a deposit of comparatively solid soil, the washing out of the underlying sand causes an instantaneous fall of quite a length and breadth of the superstratum of soil into the river; so that it may, in one sense of the term, be said that the diminution of the banks is not gradual and imperceptible, but sudden and visible. Notwithstanding this, two things must be borne in mind, familiar to all dwellers on the banks of the Missouri River and disclosed by the testimony—that while there may be an instantaneous and obvious dropping into the river of quite a portion of its banks, such portion is not carried down the stream as a solid and compact mass, but disintegrates and separates into particles of earth borne onward by the flowing water, and giving to the stream that color which, in the history of the country, has made it known as the “muddy” Missouri; and, also, that while the disappearance, by reason of this process, of a mass of bank may be sudden and obvious, there is no transfer of such a solid body of earth to the opposite shore, or anything like an instantaneous and visible creation of a bank on that shore. The accretion, whatever may be the fact in respect to the diminution, is always gradual and by the imperceptible deposit of floating particles of earth. There is, except in such cases of avulsion as may be noticed hereafter, in all matter of increase of bank always a mere gradual and imperceptible process. There is no heaping up at an instant, and while the eye rests upon the stream, of acres or rods on the forming side of the river. No engineering skill is sufficient to say where the earth in the bank washed away and disintegrating into the river finds its rest and abiding place. The falling bank has passed into the floating mass of earth and water, and the particles of earth may rest one or fifty miles below and upon either shore. There is, no matter how rapid the process of subtraction or addition, no detachment of earth from the one side and deposit of the same upon the other. The only thing which distinguishes this river from other streams, in the matter of accretion, is in the rapidity of the change, caused by the velocity of the current; and this in itself, in the very nature of things, works no change in the principle underlying the rule of law in respect thereto.

Our conclusions are that, notwithstanding the rapidity of the changes in the course of the channel and the washing from the one side and onto the other, the law of accretion controls on the Missouri River as else-

where, and that not only in respect to the rights of individual land-owners but also in respect to the boundary line between States. The boundary, therefore, between Iowa and Nebraska is a varying line, so far as affected by these changes of diminution and accretion in the mere washing of the waters of the stream.

The United States Supreme Court quotes largely from the opinion of Attorney General Cushing and states that his opinion was given because a dispute arose between the United States and Mexico in consequence of changes in the Rio Grande. (See U. S. Case App., p. 1156.) As will be seen from the reference of the matter to Attorney General Cushing (U. S. Case App., p. 1129), the question of an avulsive change in the Valley of El Paso was the occasion of the reference by the Secretary of the Interior to the Attorney General.

Another case which grew out of the accretion to the land in the disputed territory was *Denny et al. v. Cotton et al.* (Texas Court of Civil Appeals, 22 S. W. Rep., pp. 122 to 126.)

Denny et al. prior to the year 1887 applied to the land office of the State of Texas to patent two sections of land in the southern part of Cotton Addition. Under the legislation by which Texas was admitted as one of the United States, all public lands were retained by the State. The State issued two patents, one to Denny and one to Lee. Cotton had purchased land in 1881 which had been surveyed in 1858 and was known as N. W. Burdett Survey No. 2. (See U. S. Countercase App.; p. 139.) When Cotton purchased the land, the west boundary line reached to the river, which then ran farther south than it does at present. (See Hart map with U. S. Countercase App.) Denny and Lee claimed that the N. W. Burdett Survey No. 2 reached only to where the river was in 1858 and that the accretion land formed to the south of that point belonged to the State. Cotton brought suit against Denny and Lee in an action of trespass to try title. A large amount of evidence was taken, showing the nature of the formation of the land and the change southward of the channel of the river. The district court at El Paso and the court of civil appeals both decided that the land was accretion land to the Cotton Addition, and in the opinion of the appellate court it quotes at length both from the case of *Nebraska v. Iowa*, *ubi supra*, and from the opinion of Attorney General Cushing, with other authorities. This opinion of *Denny v. Cotton* is printed with United States Countercase Appendix, page 234.

The doctrine enunciated above in regard to the ownership of land which has been formed by the receding of the river is the doctrine which has been established from the time text-books were first written concerning a river boundary between nations.

It has always been the rule that if a river separates two nations and neither of them can prove priority of settlement, the dominion of each extends to the middle of the river.

Bello Derecho Internacional, ed. 4, pp. 46-47.

Martens. Précis du Droit des Gens Moderne de l'Europe, vol. 1, pp. 134-136, sec. 39.

There is an historical review of boundary rivers and streams; the middle of the river and the *thalweg* by Ernest Nys.—*Revue de Droit international et de Legislation comparée Q^{ue} Serie* (1901), III: 75.

He says:

To characterize properly the *ideal* boundary, a word had been borrowed from the ancient writers; it is the adjective *arcifinius* or *arcifinialis*. Grotius especially employed the terminology *territoria arcifinia*, which his commentators explain by saying that such territories have boundaries established by nature—mountains or rivers—which permit one to keep off the enemy, *finis arcendis hostibus idonei*.

If a river constitutes a boundary and has not come into the exclusive possession of one of the riparian nations, it will be assumed in case of doubt that the middle of the river is the boundary. In the case of navigable rivers the *thalweg* is taken as the middle when there is doubt.

Bluntschli, Das Moderne Völkerrecht (1878).

Bonfils, Manuel de Droit International Public (ed. 5), sec. 523C.

Calvo, Dictionnaire de Droit International (1885), tome 1, pp. 337, 338.

Ch. Calvo, Droit International, tome 1, ed. 5, 1896, sec. 342.

Creasy, International Law, pp. 221-224.

Liszt, Das Völkerrecht, Berlin, 1904, pp. 75, 162-163.

It goes without saying that if the *thalweg* changes place, the river follows this change. If the river cuts a new bed for itself, the abandoned bed is kept as the boundary.

De Martens. Traité de Droit International. Vol. 1, p. 456, chap. III, sec. 88.

Reference is made to the citations and quotations made of Mexican law as applicable to this subject as found in the opinion of Attorney General Cushing. (See U. S. Case App., p. 559.)

The authorities there cited are:

Don Antonio Riquelme, *Derecho Internacional*, Tome I, p. 83.

Don Andres Bello, *Derecho Int.*, p. 38.

Don Jose Maria de Pando, *Derecho Int.*, p. 99.

Almeda, *Derecho Publico* Tome I, p. 199.

The following quotation is from *Sala Mexicana*, Tome II, pages 61-65, section 6:

22. Continuous accession is divided into natural and industrial and occurs in personal property and real estate. Natural accession in real estate arises from four causes—alluvion, flood or manifest force of rivers, change of bed or channel, and islands appearing in rivers. In this same class of property there occurs industrial accession through building, and there is a mixed accession consisting of planting or sowing. The Emperor Justinian says of alluvion that it is *inclementum latens*; that it is confined as the successive, imperceptible accretion to property from rivers. This acquisition is recognized by the law of nations, and the reason why such an increase belongs industrious to the owner of the land which has been increased by alluvion, consists in the imperceptible nature of the increase, for although, in order that a river may have added land to my possession, it must necessarily have taken it away from some other possession, this increase, as it is supposed to be imperceptible, does not show for certain the owner who lost it.

The following quotations and authorities bear out the same doctrine:

The Institutes of Justinian, translation by J. B. Moyle, 4th ed., pages 38, 39.

Moreover, soil which a river has added to your land by alluvion, becomes yours by the law of nations. Alluvion is an imperceptible addition; and that which is added so gradually that you can not perceive the exact increase from one moment of time to another is added by alluvion.

Rayneval, *Institutions de Droit de la Nature et des gens*, Vol. I, page 307, sec. 2:

It often happens that the course of rivers is toward one shore rather than the other, and that they leave accretions on the opposite shore which are formed by alluvion. In this case the accretions go to the nation to which the contiguous land belongs, the other having no right to demand compensation.

Travers Twiss, *The Law of Nations* (London, 1884), Chapter IX, sec. 154, page 252.

Creasy, *International Law*, pages 221-224:

With regard to the third class of lands, i. e., *agri arcifinii*, a river which bounds them changes the boundaries of territory and jurisdiction by gradually altering its course; and whatever it adds on one side belongs to the territory on that side, because the two States between which the river flows are presumed to have originally taken the center

of the river as their natural boundary. This is so where the change of the course of the river is gradual. For there the change of its parts does not destroy its identity but leaves it the same.

Hall, *International Law*, pages 121-122.

Halleck's *International Law*, vol. i (Sir Sherston Baker, Bart.) pages 182 to 184.

Puffendorf, *Law of Nature*, pages 403-406.

Carnassa Amari. *Traite de Droit International Public en Temps de Paix*, sect. 18, p. 522:

The land imperceptibly abandoned by the current of the water belongs to the nation on whose side the abandonment takes place, the other nation on to which the river advances not being allowed to demand any compensation, because the damage it sustains arises from a natural and fortuitous phenomenon. The river continues to constitute the boundary between the two nations, and the line of the thalweg is always situated in its axis.

Italian Civil Code, Art. 436.

Handbuch des Volkerrechts Holtzendorff, vol. 2, Hamburg, 1887, sect. 36, pages 266-268.

Taylor, *International Public Law*, pages 274, 275.

Vattel, *le Droit des Gens* (1863) Tome I, pp. 563, 564.

Whewell's *Grotius*, Cambridge, 1853, Chap. III.

Ch. Calvo, *Droit International*, Tome I, ed. 5, 1896, section 333, has the following reference to the treaty of 1848:

By virtue of the Convention of Guadalupe, under date of February 2, 1847, it is the Rio Grande, the Gila, and Colorado Rivers that constitute the boundary between the United States and Mexico from the Gulf of Mexico to the Pacific Ocean.

PREScription.

THE UNITED STATES OF AMERICA ASSERTS INTERNATIONAL TITLE TO "EL CHAMIZAL" BY RIGHT OF PRESCRIPTION.

The Republic of Mexico is estopped to assert international title over the territory known as "El Chamizal" by reason of the undisturbed, uninterrupted, and unchallenged possession of said territory by the United States of America since the treaty of Guadalupe Hidalgo.

The right of prescription here invoked by the United States of America is an integral principle of the law of nations.^a

^a Bello: "Prescription is even more important and necessary between nations than between individuals." (*Derecho Internacional*, edition 4, pp. 42, 43; paragraph 6.)

Bluntschli: Prescription "is absolutely indispensable in International Law." (*Das Moderne Völkerrecht* [1878], p. 177, par. 290.)

Despagnet: Prescription "is almost universally admitted in the International Relations." (*Droit International Public*, 3rd Ed., sec. 380.)

Field: "The uninterrupted possession of territory or other property for fifty years by a nation, excludes the claim of every other nation." (*International Code*, second edition, sec. 52, p. 22.)

Supreme Court of the United States of America: "Prescription is applicable to the title to national property." (*Rhode Island versus Massachusetts*, 4 Howard, 591; *Boyd's Lessee versus Graves*, et al, 4 Wheaton, 513; *Indiana versus Kentucky*, 136 U. S., 479; *Virginia versus Tennessee*, 148 U. S., 503; *United States versus Chaves*, 175 U. S., 509; *Louisiana versus Mississippi*, 202 U. S., 1. Moore.—*International Arbitrations*, vol. 4, pp. 4179-4203.)

Foignet: "Prescription must be recognized as a mode for acquisition among nations * * * notably in determining the boundaries between two nations." (*Manuel Élémentaire de Droit International Public*. Edition 6, pp. 116, 117, paragraph 4.)

Glenn: "When title to territory has received the consecration of time it should be declared valid." (*International Law*, p. 51, section 38.)

Hall: "Title by prescription arises out of a long continued possession." (*International Law*, 4th edition, chapter 36, p. 123.)

Lawrence: "Though its existence in international law has been denied by some writers, the balance of authority is overwhelmingly in its favor." (*Principles of International Law*, p. 166.)

Maxey: "The doctrine is necessary in order to prevent strife and give stability to titles." (*International Law*, p. 146.)

Martens: "The mutual advantage to the nations seems in reality to demand that we recognize it." (*Précis du Droit des Gens Moderne de l'Europe*, vol. 1, Chapter IV, section 70.)

Oppenheim: "Prescription in international law may be defined as the acquisition of sovereignty over territory through continuous and undisturbed exercise of sovereignty over it." (*International Law*, chapter 16, p. 293.)

Phillimore: "It will be found * * * in the highest degree irrational to deny that Prescription is an ultimate means of International Acquisition." (*International Law*, vol. 1, chap. 13.)

Grotius: "If we should admit it to be true (that prescription can not take place between two free nations), a very great inconvenience would follow; the disputes about kingdoms and boundaries would never be at an end, which is * * * contrary to the common sense of nations." (*Rights of War and Peace*, Book —, chapter 4.)

Puffendorf: "There can happen very few cases in which dominion and sovereignty shall not be the consequence of prescription when a State or people have

OF WHAT MAY BE PRESCRIBED.

Any right which may be the subject of sovereign title may be prescribed, i. e., territory and boundaries.

In this case the United States of America asserts a dual prescription. First. To the Rio Grande as a water boundary since 1836. Second. To the Chamizal tract since it was formed, beginning in 1852.^a

HISTORICAL NOTE.

It has already been stated^b that in the negotiations in 1804 between the French Republic and the Spanish Monarchy, debating their claims to the lands bordering the Gulf of Mexico, France asserted the Rio Bravo, from its mouth to the thirtieth degree of latitude, to be the line of demarcation.^c After the acquisition of Louisiana by the United States of America, the Secretary of State, addressing the Spanish plenipotentiary, asserted the rights of the United States to extend to the Rio Bravo, citing in support of this claim Don Thomas Lopez, geographer to the King of Spain. (United States Countercase Appendix, 124.)

possessed themselves of anything upon a peaceful title." (The Law of Nature and Nations, Book 4, chapter 12, section 9.)

Ralston, in his volume entitled "International Arbitral Law and Procedure," cites the treaty between Venezuela and Great Britain for determination of the boundary between British Guiana and Venezuela: "(a) Adverse holding or prescription during a period of fifty years shall make a good title." (P. 270.)

Riquelme: "The dominion of nations is acquired and lost by prescription." (Derecho Público Internacional, 1875, p. 29.)

Vattel: "Having shown that * * * prescription is founded in the law of nature, it is easy to see that (it) is equally a part of the Law of Nations." (Law of Nations, chapter 11, p. 190 (?).)

Piédelièvre: "The largest number of international law writers accept it (the doctrine of prescription), and we believe rightly. It is certain that the doctrine is in conformity with international practice." (Précis de Droit International Public ou Droit des Gens, Vol. I, sec. 430.)

Wheaton: "It can not be seriously doubted, that long-continued firm possession, especially if practically undisputed by force, is sufficient to create sovereign title." (Elements of International Law, 8th ed., chap. 4, pt. 2, sec. 164.)

Wildman: "The principle of prescription applies no less forcibly to national than to private parties." (Institutes of International Law, vol. 2, p. 24.)

Calvo: "Acquisition by prescription is more necessary for states than individuals." (Droit International, vol. 1, par. 173.)

^a Field: International Code, second edition, section 53; Supreme Court of the United States of America, Rhode Island v. Massachusetts, IV Howard, 591.

Lawrence: Principles of International Law, p. 166; Grotius: Rights of War and Peace, Book —, chapter 4; Riquelme, Derecho Público Internacional, edition of 1875, page 29; Piédelièvre: Précis de Droit International Public ou Droit des Gens, Vol. I, sec. 430.

"Prescription renders great service, notably in determining boundaries between two nations." Foigniet, Manuel Élémentaire de Droit International Public, sixth edition, pages 116-117, section 4.

^b See *supra*, p. 8.

^c See secret instructions for the Captain-General of Louisiana approved by the First Consul (U. S. Countercase Appendix, 123.)

After cession by the United States of America of all rights in Texas to Spain in exchange for the Floridas in 1819, title to both banks of the Rio Grande rested in the Spanish Crown until Mexico achieved her independence from Spain in 1824. Twelve years later Texas won her independence from Mexico, and in the treaty of Velasco the Rio Grande was established as the boundary between Mexico and Texas from its mouth to its source.^a

OF THE LENGTH OF TIME NECESSARY TO PERFECT THE RIGHT.

Phillimore says:

It will be found, on the one hand, in the highest degree irrational to deny that Prescription is a legitimate means of International Acquisition; and it will, on the other hand, be found both inexpedient and impracticable to attempt to define the exact period within which it can be said to have become established—or, in other words, to settle the precise limitation of time which gives validity to the title of national possessions.^b

Field proposes a period of 50 years as a suitable time,^c while many writers fix the lapse of time "necessary for a generation to be born, educated, and come into possession of the powers and duties of the State."^d

OF THE PROOFS OF PRESCRIPTION.

Phillimore says:

The proofs of prescriptive possession are simple and few. They are principally publicity, continued occupation, absence of interruption, aided no doubt generally, both morally and legally speaking, by the employment of labor and capital upon the possession by the new possessor during the period of the silence or passiveness, or the absence of any attempt to exercise proprietary rights by the former possessor.

To the same effect in general are the various international law writers heretofore quoted herein, to whom reference is hereby made.

^a See Congressional Globe, Appendix, Thirtieth Congress, first session, page 660. See also United States Countercase Appendix, page 134. See act of Congress, Republic of Texas, approved December 31, 1838; also United States Countercase Appendix, page 132; *Ibid.*, page 133; *Ibid.*, page 135; *Ibid.*, page 137; *Ibid.*, page 138.

^b Phillimore's International Law, volume 1, chapter 13.

^c See Field's International Code, second edition, page, 22, section 52.

^d Bello, *Derecho Internacional*, Edition 4, pages 42-43, section 6; pages 46-47, section 1; pages 135-139, section 3; Bluntschli, *Das Moderne Völkerrecht* (1878), paragraph 290, page 177; Foignet, *Manuel Élémentaire de Droit International Public*, Edition 6, pages 116, 117, section 4; Glenn, *International Law*, page 50, Maxey, *International Law*, page 146; Oppenheim, *International Law*, chapter 16, section 243; Phillimore, *International Law*, volume 1, chapter 13, paragraphs CCLV and CCLVI; also see CCLVIII and CCLIX; Piédelièvre, *Précis de Droit International Public ou Droit des Gens*, volume 1, section 430; Taylor, *International Public Law*, section 219; Twiss, *The Law of Nations* (London, 1884), chapter 8, section 129, pages 212-213; also Twiss, *The Oregon Question Examined*, pages 170-174; Vattel, *Law of Nations*, chapter 11, pages 190-191; Wheaton, *International Law*, Part II, chapter 4, secs. 164-165.

Has the possession of the United States of America of the "Chamizal" been public, continuous, and without interruption? Since the gradual formation of the "Chamizal" tract the United States Congress has exercised jurisdiction over the tract.^a The customs authorities and peace officers of the United States of America have exercised undivided, undisputed, and uninterrupted authority over the "Chamizal" tract and to the center of the Rio Grande, bordering thereon, since 1846.^b

The Republic of Texas established and maintained its boundaries to the Rio Grande from March 2, 1836, to its incorporation into the United States of America in 1846.^c The Legislature of the State of Texas repeatedly, openly, and continuously asserted and exercised jurisdiction to the same point.^d

The Public Land Office and Land Commissioners of Texas have exercised coextensive jurisdiction.^e

The municipal corporation of El Paso has exercised like authority since its creation.^f

The peace officers and tax collectors of the State of Texas and city and county of El Paso have exercised a like and undisturbed authority within the same limits.^g

The representatives and authorities of the United States of Mexico have recognized and acquiesced in the exercise of such jurisdiction by the United States of America and by the State of Texas and by the city and county of El Paso.^h

Has the possession of the United States been aided morally and legally by the employment of labor and capital upon the territory embraced in "El Chamizal?"

In answer it is sufficient to say that the record discloses the utilization of the property at all times since its gradual formation for the erection and maintenance of public buildings, railways, irrigation works, pavements, public sewers, residences, and business houses by the Government of the United States of America, of the State of Texas, and of the city and county of El Paso, Tex.,

^a See U. S. Countercase Appendix, p. 132; *ibid.*, 133; *ibid.*, 170.

^b See U. S. Countercase Appendix, pp. 185 to 202.

^c See treaty of Velasco, *supra*; also U. S. Countercase Appendix, pp. 134, 135, and 137.

^d See U. S. Countercase Appendix, pp. 137, 138, and 139.

^e See U. S. Countercase Appendix, pp. 139 to 146.

^f See U. S. Countercase Appendix, pp. 139 and 147 to 168; also map No. 10, U. S. Countercase Appendix.

^g See U. S. Countercase Appendix, pp. 185 to 202.

^h See U. S. Countercase, pp. 172 to 183; also pp. 185 to 202; see also diplomatic correspondence published in the appendices to the United States Case and the United States Countercase, as well as the appendices of the Mexican Case and Countercase. See U. S. Countercase Appendix, pp. 172-185.

and of the citizens and inhabitants thereof. In further support of which reference is respectfully made to the territory itself.

Therefore, it is respectfully submitted upon this phase of the case, before this honorable court, that the rights of the United States of America are "founded on the solid rock of prescription; the soundest, the most general, and the most recognized title between man and man that is known in municipal or public jurisdiction, a title in which no arbitrary institution or the eternal order of things gives judgment; a title which is not the creature, but the master of positive law; a title which, though not fixed in its terms, is rooted in its principle in the law of nature itself and is indeed the original ground of all known property, for all property and soil will always be traced back to that source and arise there."^a

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^a Burke, Works, Vol. VI, p. 411, Revised Edition.

